In The

Supreme Court of the United States

October Term, 1960

No.

No.

PETITION OF WISCONSIN EMPLOYMENT RELATIONS BOARD FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

In The

Supreme Court of the United States

October Term, 1960

No.....

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner,

v.

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Respondent.

No.....

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner,

v.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Respondent.

PETITION OF WISCONSIN EMPLOYMENT RELATIONS BOARD FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The Wisconsin Employment Relations Board prays that writs of certiorari issue to review the judgments of the Supreme Court of Wisconsin entered in the above entitled cases October 4, 1960, on which rehearing was denied November 29, 1960. The judgments involve closely related questions.

A separate petition for certiorari to review the judgment in the first entitled cause* is being submitted by the Allis-Chalmers Manufacturing Company. A separate petition for certiorari in the second entitled case** is being submitted by Joseph Carey and others, employees of the Allen-Bradley Company in Milwaukee. Such petitions should be considered with this petition, since the same judgments are involved.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin in the first entitled case is reported in 11 Wis. 2d 277, 105 N. W. 2d 271, and is printed in the appendix separately filed by this petitioner.*** (W. E. R. B. App. pp. 1-15).

The opinion in the second entitled cause is printed in 11 Wis. 2d 292, 105 N. W. 2d 278, and is printed in the appendix hereto (W. E. R. B. App. pp. 16-20).

The opinions of the circuit court for Milwaukee County, Wisconsin, which were reversed by the state's supreme court, are reported in 2 L. R. R. (46 L. R. R. M.) 2628, and are printed in the appendix hereto (W. E. R. B. App. pp. 20-46). The orders of the Wisconsin Employment Relations Board, which were affirmed by the circuit court and re-

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*Local 248, U. A., A. & A. I. W. v. Wis. E. R. Board, (1960) 11 Wis. 2d 277, 105 N. W. 2d 271

**Wisconsin E. R. Board v. Lodge 78, I. A. of M., (1960) 11 Wis. 2d 292, 105 N. W. 2d 278

***The appendix was printed separately because the inclusion of the decisions of three tribunals below required so many pages that it was believed the court might find it more convenient to refer to them under another cover. References in this petition will be to W. E. R. B. App. p. —.

versed by the supreme court are unreported, and are printed in the appendix hereto (W. E. R. B. App. pp. 47-77).

JURISDICTION

The judgments of the supreme court of Wisconsin were entered October 4, 1960* (Case I, R. 186-193; Case II, R. 184-186). Timely motions for rehearing were filed October 21, 1960 (Case I, R. 194; Case II, R. 187). The motions were denied November 29, 1960 (Case I, R. 198; Case II, R. 189).

The jurisdiction of this court is invoked under 28 U. S. C. § 1257 (3), since the validity of a state statute is drawn in question on the ground of its being repugnant to a law of the United States.

QUESTIONS PRESENTED

1. Did Congress intend, by the proviso in sec. 8 (b) (1), Labor Management Relations Act, 1947, to grant to labor organizations affirmative authority to coerce members who seek to exercise their right to refrain from striking, so as to protect such coercion from state regulation?

2. Did Congress, by the Labor Management Relations Act, 1947, preempt regulation of relations between labor organizations and their members, so as to oust states of authority to exercise traditional police power in such fields?

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*In references to the records, **Local 248 v. Wisconsin E. R. Board**, etc., will be designated as Case I, and **Wisconsin E. R. Board v. Lodge 78**, etc., will be referred to as Case II.

STATUTES INVOLVED

The statutes primarily involved are secs. 7 and 8 (b) (1) of the Labor Management Relations Act, 1947 (29 U. S. C. § 157 and § 158 (b) (1)), and secs. 111.04 and 111.06 (2) (a), Wis. Stats., the pertinent parts of which read respectively:

29 U. S. C. § 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U. S. C. § 158 (b) (1):

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

Sec. 111.04, Wis. Stats., provides:

> "Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Sec. 111.06 (2) (a), Wis. Stats., provides:

"It shall be an unfair practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

STATEMENT

Case I (Local 248 v. Wisconsin E. R. Board)

The Wisconsin Employment Relations Board, on September 28, 1959, issued an order pursuant to a complaint of unfair labor practice under Wisconsin statutes, requiring the respondent, Local 248, to desist from fining and threatening to fine members for working during a strike (Case I, R. 101-104; W. E. R. B. App. pp. 47-55).

The respondent's answer to the complaint before the state board had challenged the board's jurisdiction on the ground that the activities complained of were "of such nature that they are regulated, if at all, by the United States Labor Management Relations Act, as amended" (Case I, R. 158).

When the state board's order came before the circuit court of Milwaukee county for review, the respondent challenged the order as "unlawful for the reason that the Labor Management Relations Act of 1947 as amended, and the Labor Management Reporting and Disclosure Act of 1959, preempt the subject" (Case I, R. 151).

The respondent again argued before the Supreme Court of Wisconsin that the state statute could not be applied because Congress had ousted the state of jurisdiction.

The Wisconsin Supreme Court reversed the judgment of the circuit court and set aside the order of the state board on the ground that the action was beyond the state's jurisdiction because of federal preemption.

Case II (Wisconsin E. R. Board v. Lodge 78)

On April 27, 1959, the Wisconsin Employment Relations Board issued an order pursuant to complaint of unfair labor practice by twelve employees of the Allen-Bradley Company requiring the respondent, Lodge 78, to cease prosecuting actions in Wisconsin courts to enforce collection of fines imposed upon members for working during a strike.

The answer of Lodge 78 before the board had alleged "that under the Labor Management Relations Act as amended," the allegations of the complaint "constitute a violation of Section 8 (b) (1), and that by reason thereof the Wisconsin Employment Relations Board has no jurisdiction" (Case II, R. 146).

A charge of unfair labor practice based on the identical facts, which had been filed by the same twelve employees

with the National Labor Relations Board, had been dismissed by the General Counsel on October 28, 1957, (Opinion F-198) on the ground that the conduct was excluded from the definition of unfair practices under federal law by the proviso of sec. 8 (b) (1), Labor Management Relations Act, 1947 (Case II, R. 180).

The jurisdictional issues were subsequently argued before, and decided by, the circuit court of Milwaukee County and the Wisconsin Supreme Court. The decision of the latter court rested on the ground that the state has been ousted by Congressional action of jurisdiction to deny enforcement in state courts of fines by labor organizations against their members who exercise their right as employees to refrain from striking.

REASONS FOR GRANTING THE WRIT

With Respect to Question I (Whether Congress Has Granted to Labor Organizations Affirmative Authority to Coerce Members)

1. The Wisconsin Supreme Court's decision that Congress, in the excepting *proviso* to its definition of an unfair labor practice, gave affirmative protection to coercion of members by a labor organization, is in conflict with this court's decision in *Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board,* (1949) 336 U. S. 301, 307, 69 S. Ct. 584, 93 L. ed. 691. This court said:

> "* * * It is argued, therefore, that a State cannot forbid what § 8 (3) affirmatively permits. The short answer is that § 8 (3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. * * *"

2. The decision of the Wisconsin Supreme Court that federal law guarantees to labor organizations the right to coerce members to participate in a strike, conflicts with sec. 7 of the Labor Management Relations Act, 1947 (29 U. S. C. § 157). Sec. 7 gives to every employee the right to make his own decision whether to participate in, or refrain from, a particular concerted activity; and such section contains an express exception to show that Congress intended there should be no others.

In giving employees the right to join or to refrain from joining a specific concerted activity, Congress has imposed upon each individual the correlative responsibility to evaluate the activity.

If Congress has *guaranteed* to organizations the right to coerce a member to join an activity with which the member is not in sympathy, that right is guaranteed not only with respect to strikes which a court may deem meritorious, but also with respect to strikes which the same, or another, court might deem to have little or no merit.

If the authority of a labor organization to coerce is protected so as to supersede rights of employees guaranteed by sec. 7, it must extend to *all* rules which might be adopted within the scope of the proviso, whether wise or unwise.

It seems anamolous to suggest that Congress intended by indirection to extend protection to coercion which would vitiate rights it expressly guaranteed in sec. 7.

3. The decision of the Wisconsin Supreme Court conflicts with the express declaration of Congress in the Labor Management and Reporting Act of 1959 (directed toward

regulation of relations between labor organizations and their members) that:

> "* * * nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other federal law or law of any state." (Sec. 603 (a), Labor Management Reporting and Disclosure Act of 1959)

In Case II, invalidity of the state's regulation was asserted on the ground of alleged conflict with the Labor Management and Reporting Act of 1959.

Whatever federal act may be urged as precluding state action, the question is one of *Congressional intent.* The provision above quoted is the most recent statement of Congressional intent. It shows that Congress had no wish to oust states from providing protection to members of labor organizations against coercive or arbitrary action by such organizations.

4. The basic theory of the Wisconsin court that Congress "has spelled out the balance of bargaining power it desires to maintain between unions and employers" so that "any attempt by the state to regulate union activity in such a way as to disrupt the balance" (W. E. R. B. App. pp. 10-11) would for all practical purposes eliminate regulation by states and thus conflict with this court's repeated decisions exemplified in *Garner v. Teamsters Union,* (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228, that federal legislation "leaves much to the states."

It is difficult to visualize any activity on the part of a labor organization which is not motivated by a desire to strengthen its bargaining position.

The rulings of such decisions as *United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd.*, (1956) 351 U. S. 266, 76 S. Ct. 794, 100 L. ed. 1162 and *International Union v. Wisconsin E. R. Board*, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651, could be readily evaded by fining members who refused to take part in the tactics there involved, on the ground that such refusal is conduct unbecoming a union member.* The state regulation in the two foregoing cases was a regulation of union activity which was designed for the very purpose of affecting the balance of bargaining power.

5. The state court's ruling that only the National Labor Relations Board "has jurisdiction to determine whether such activity is protected" (W. E. R. B. App. p. 13) conflicts with the many decisions of this court in which it has held that specified activities are, or are not, protected by the Labor Management Relations Act, 1947, without prior determination of such question by the National Labor Relations Board:

DeVeau v. Braisted, (1960) 363 U. S. 144, 4 L. ed. 2d 1109, 80 S. Ct. 1146;

Local 24 of Internat'l Bro. of Teamsters, etc. v. Oliver, (1960) 362 U. S. 605, 4 L. ed. 2d 987, 80 S. Ct. 923;

International Union, etc. v. O'Brien, (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978;

Wisconsin E. R. Board v. Milwaukee G. L. Co., (1950) 258 Wis. 1, 44 N. W. 2d 547;

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*The fines in the cases for which certiorari is sought were imposed for "conduct unbecoming a union member."

International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651;

Hill v. State of Florida, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

The national board has determined categorically that it has *no* jurisdiction of the activities here involved because such activities are *excepted* from the unfair practices proscribed by federal law.* Congress has given the board no authority to determine what activities are protected by section 7. As pointed out by Professor Archibald Cox: (Report of the 1958 Proceeding of the section of Labor Relations Law of the American Bar Ass'n., p. 18)

"* * * In the typical case there are ample precedents by which to judge whether the union's conduct is a protected concerted activity within the meaning of section 7 or an unfair labor practice forbidden by section 8 (b). The courts, including the Supreme Court, regularly decide cases involving these sections, without deference to the N. L. R. B., when much less is involved than the allocation of power between state and nation. Furthermore, it scarcely comports with respect for either state governments or the traditional functions of the Supreme Court to suppose that Congress intended an administrative agency to decide which controversies should be governed by national law and which by state authority. The most serious criticism is that *there is no way in which a party trapped in such a situation can invoke the primary jurisdiction of the N. L. R. B. and secure a determination whether the employees' conduct is protected by section 7. The N. L. R. B. is given no power to make this kind of declaratory ruling.* * * *" (Emphasis supplied)

*Minneapolis Star Tribune Co., (1954) 109 N. L. R. B. 727; Peerless Tool & Engineering Co., (1955) 111 N. L. R. B. 853, 857.

Since the decisions of which review is sought are based wholly on interpretation of federal law, there is no tribunal except this court which can make a final determination whether coercion of members by labor organizations is an activity protected against state regulation.

6. The paralysis of states' power to grant remedies to their citizens would not be limited to Wisconsin, because the labor organizations involved in the cases operate in all fifty states. The decision of the state court in these cases will be urged by the respondents in support of their practices in other states.

With Respect to Question II (Preemption by Congress of Regulation of Relations Between Labor Organizations and Their Members)

The state court repeatedly stated that the field of regulation here involved is preempted by Congress. If that be the effect of the state judgment, it conflicts with this court's decision in *International Ass'n. of Machinists v. Gonzales*, (1958) 356 U. S. 617, 78 S. Ct. 923, 2 L. ed. 2d 1018, in which it was held that questions of (a) "arbitrariness and misconduct vis-a-vis the individual union members and the union" (*loc. cit.* 356 U. S. 622) and (b) "the breach of a contract governing the relations between * * * [a member] and his union" (*loc. cit.* 356 U. S. 621-622) are "a merely peripheral concern of the Labor Management Relations Act." (*loc cit.* 356 U. S. 617)

The court there further said:

"* * * the protection of union members in their rights as members from arbitrary conduct by unions

> and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. * * *" (*loc. cit.* 356 U. S. 620)

The cases for which certiorari is sought involve the same subject matter as described in the above quotations. Both the respondents and the Wisconsin court recognized that the fines were imposed for an alleged "breach of a contract governing the relations between" a labor organization and its members. (*loc cit.* 356 U. S. 621-622, *supra*) The only factual difference between these cases and the *Gonzales case* is that here the alleged breach is by the member, whereas in the *Gonzales case* it was by the labor organization.

If the contract relation created by the membership rules of a union has been preempted, states are ousted of authority to regulate in a manner to *further* congressional objectives as well as for any other purpose, because, as this court said in *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 quoting Mr. Justice Holmes:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition."

Accordingly, if the subject matter is *preempted*, state courts would have no jurisdiction to *enforce* fines imposed by a labor organization,* as Lodge 78 is seeking to do; and, since there are no grounds for a federal court to take jurisdiction, the effect of the decision would be to leave both

*This court has ruled that, in deciding questions of preemption, it is immaterial what method of regulation is used by states, or what state agency is involved. **United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd.**, (1956) 351 U. S. 266, 76 S. Ct. 794, 100 L. ed. 1162.

labor organizations and their members without remedy for contract violations on either side.

8. The precedent implicit in the state court's interpretation of federal law is that Congress has *protected* coercion by labor organizations, and has also *preempted* the field of regulation of union activity which might disrupt a balance of bargaining power spelled out by Congress. Such a judgment leaves open a number of questions which can be answered by no tribunal other than this court.

9. The uncertainty is apparent in the fact that of the three tribunals below there was a difference of opinion. While the opinion of the state supreme court may have resolved the uncertainty for one state, only this court can resolve the uncertainty with finality.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that petition for certiorari be granted.

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Attorneys for Petitioners

In The

Supreme Court of the United States

October Term, 1960

No.

No.

APPENDIX TO PETITION OF WISCONSIN EMPLOYMENT RELATIONS BOARD FOR WRITS OF CERITORARI TO THE SUPREME COURT OF WISCONSIN

In The

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October Term, 1960

No. .....

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner,

v.

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Respondent.

No. .....

WISCONSIN EMPLOYMENT RELATIONS BOARD,
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APPENDIX TO PETITION OF WISCONSIN EMPLOYMENT RELATIONS BOARD FOR WRITS OF CERITORARI TO THE SUPREME COURT OF WISCONSIN

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APPENDIX

OPINION OF WISCONSIN SUPREME COURT

Nos. 59 & 60
August Term, 1960

STATE OF WISCONSIN : IN SUPREME COURT

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent,

v.

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

Appellant.

APPEAL from two judgments of the circuit court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Reversed.*

In Case No. 59, Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO (hereinafter referred to as the "Union"), instituted a proceeding for review, pursuant to the Wisconsin Administrative Procedure Act (ch. 227, Stats.), of an order entered by the Wisconsin Employment Relations Board (hereinafter referred to as "W. E. R. B."). In Case No. 60,

W. E. R. B. petitioned the circuit court to sec. 111.07 (7), Stats. for enforcement of the order as to which review was sought by the Union in Case No. 59. The two proceedings were consolidated by the circuit court for the purpose of hearing and determination.

At all times material to the instant litigation the Union was the exclusive collective bargaining agent for the production and maintenance employees of the Allis Chalmers Company (hereinafter referred to as the "Company") at its plant in the city of West Allis, having been so certified by the National Labor Relations Board. On August 15, 1958, the labor agreement existing between the Union and the Company expired. After protracted negotiations between the parties with respect to the terms of a renewal agreement an impasse was reached. Thereupon, the executive board of the Union on February 7, 1959, called a strike. This strike had been previously authorized by a secret ballot taken of the members of the Union on August 13, 1958. The strike terminated on April 20, 1959, when a new labor agreement was entered into between the parties.

During the strike the Union picketed the Company's plant. There is no claim made that such picketing was anything but peaceful. While the strike was in progress the Company kept its plant open and work was available for any employee who wished to avail himself of it. Certain members of the Union cros d the picket line and continued to work in the plant. At a well publicized Union meeting held February 7, 1959, the president of the Union had warned that any member who crossed the picket lines and worked during the strike would be tried by the Union and fined after the strike ended. Later letters dated February

24, 1958, were sent out by the executive board of the Union to a number of the members who had crossed the picket lines and continued to work for the Company. These letters pointed out that such action constituted a violation of the Union constitution and by-laws and subjected each violator to a fine up to $100 for each offense, and that each day worked might well constitute a separate offense.

Following settlement of the strike, charges were filed with the Union against the offending members who had crossed the picket lines and continued to work. Trial committees were chosen to try such offenders. Before completion of such trials, the Company and nineteen Union members, who were then being tried, filed a complaint with W. E. R. B. charging that the Union conduct constituted coercion of the individual complainants in the exercise of their rights under sec. 111.04, Wis. Stats., and that the Union had been guilty of an unfair labor practice under secs. 111.06 (2) (a), Wis. Stats.

In the trials before the Union trial committees the offending members were represented by counsel. All nineteen, who were complainants in the W. E. R. B. proceeding, were found guilty and fined in various amounts ranging from $10 to $100 each. No claim is made that such trials and fines did not conform to the provisions of the Union's constitution and by-laws.

The by-laws of the Union do not permit resignation from membership except during a ten-day period to January first of each year. The last period for withdrawal from Union membership prior to the strike expired January 1, 1959.

W. E. R. B. conducted a hearing with respect to the complaints filed which charged that the Union had been guilty of an unfair labor practice. Under date of September 28, 1959, W. E. R. B. entered its findings of fact, conclusions of law, and order wherein it was determined: (1) that the activities of the Union were "neither prohibited by, nor protected by the National Labor Relations Act, 1947, as amended;" (2) that such activities, whereby the Union had threatened to impose fines upon the individual complainants who had crossed the picket lines, constituted an attempt to coerce the latter and other employees similarly situated in the enjoyment of legal rights guaranteed by sec. 111.04, Stats., and (3) that the Union immediately cease and desist from threatening any employee of the Company with punishment by imposition of a fine because such employee had crossed a picket line. One of the three members of W. E. R. B. filed a dissenting memorandum in which he held that there was federal preemption which prohibited state action, and expressed the further opinion that, even if W. E. R. B. had jurisdiction, the charged activities of the Union would not constitute an unfair labor practice under ch. 111, Wis. Stats. Subsequently an amended cease and desist order was entered dated October 27, 1959.

The Union timely instituted proceedings for review in the circuit court of Milwaukee county, and W. E. R. B. applied to such court for enforcement of its amended order. After a hearing, the circuit court filed a memorandum opinion upholding the determination made by the majority members of W. E. R. B. Judgments were accordingly entered under date of April 22, 1960, one of which dismissed the Union's petition for review, and the other decreed en-

forcement of W. E. R. B.'s amended order. From such judgments the Union has appealed to this court.

CURRIE, J. The parties have stipulated that the Company is engaged in business affecting inter-state commerce within the meaning of the Labor Management Relations Act, 1947. The principal issue on this appeal is whether there exists federal preemption under such Act which would preclude W. E. R. B. from exercising any jurisdiction over the activities of the Union which were the subject of the complaints before it. A second issue is presented as to whether such activities constituted conduct prohibited by the Wisconsin Employment Peace Act (ch. 111, Wis. Stats.), in the event it should be determined that there is no federal preemption. Because of the disposition made of the preemption issue we find it unnecessary to pass on such second issue.

In resolving the issue of preemption it is essential that we first examine the pertinent provisions of the Labor Management Relations Act and the Wisconsin Employment Peace Act. We deem these to be the following:

Sec. 7 of the Labor Management Relations Act, 29 USCA, sec. 157. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

Sec. 8 (b) (1) of the Labor Management Relations Act, 29 USCA, sec. 158 (b) (1). "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein: . . ."

Sec. 111.04, Wis. Stats. "Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

Sec. 111.06 (2) (a), Wis. Stats. "It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

An examination of the above quoted statutory provision discloses that sec. 111.04, Wis. Stats., provides substantially the same as does Section 7 of the Labor Management Relations Act. Likewise sec. 111.06 (2) (a), Wis. Stats., corresponds closely to the aforequoted portion of

Section 8 (b) (1) of the Labor Management Relations Act except for the proviso provision of the latter, which reads as follows:

"Provided, That this paragraph shall not *impair the right* of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;" (Italics supplied.)

The parties concede that a fine imposed by a union pursuant to its constitution and by-laws upon a member, who has violated such constitution and by-laws by crossing a picket line during a strike in order to continue his employment, is a union activity embraced within the scope of such proviso. If it were not, then there clearly would be preemption because, if the union conduct at issue here constitutes illegal coercion, it would be prohibited under the federal Act as well as the Wisconsin Employment Peace Act. Therefore, the crucial question is whether Congress by insection of such proviso intended to make such an activity a protected one, or whether it intended that such union conduct should remain outside of the scope of Congressional regulation so that the states might regulate it if they so desire. It is the latter interpretation that was adopted by the majority members of W. E. R. B. and the trial court.

One of the more recent, as well as informative, decisions of the United States supreme court on the issue of preemption under the Labor Management Relations Act is that of *San Diego Unions v. Garmon* (1959). 359 U. S. 236, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775. The test of preemption in the labor relations field laid down in that decision is whether the activity "is arguably within the compass of

sec. 7 or sec. 8 of the [Labor Management Relations] Act." If it is, then the state's jurisdiction is displaced and the issue must be decided by the National Labor Relations Board and not by the court or the states. This is because that is the agency which Congress has clothed with authority to determine such issue. The failure of such board to define the legal significance under the Act of a particular activity does not give the states power to act. Of particular significance is the following statement appearing at page 246 of the opinion:.

> "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

In such decision in the *Garmon Case* the United States supreme court did point to a type of activity that is not arguably within the compass of Section 7 and 8 of the Labor Management Relations Act when it declared (at pp. 243, 244):

"However, due regard for the presupposition of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us to find withdrawal from the States of power to regulate where the activity regulated was *a merely peripheral concern* of the Labor Management Relations Act. See *International Assn. of Machinists v. Gonzales*, 356 U. S. 617 [78 Sup. Ct. 923, 2 L. Ed. (2d) 1018]." (Emphasis supplied.)

The aforequoted statement, with its reference to the *Gonzales Case*, is most pertinent because such case has

been cited by counsel on both sides of the instant appeal, and in the memorandum opinion of the learned trial judge. In that case Gonzales brought suit against the union in a California state court for restoration of his union membership and for damages, claiming that his expulsion from the union violated the union constitution and by-laws. Gonzales secured judgment in his favor which was affirmed by the California district court of appeals. The California supreme court refused to accept an appeal to it, and the union then appealed to the United States supreme court. There the union did not question that part of the judgment which restored membership to Gonzales, but contended that there was federal preemption under the Taft-Hartley Act which precluded the state court from granting relief in the form of damages. The United States supreme court disposed of such argument by stating (at pp. 621-622):

"The possibility of conflict from the court's award of damages in the present case is not greater than from its order that respondent be stored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceive it, was the breach of a contract governing the relations between respondent and his unions."

In the case of *United Automobile, A. & A. I. Workers v. Woychik* (1958), 5 Wis. (2d) 528, 93 N. W. (2d) 336, this court affirmed the judgment of the trial court in favor of the plaintiff union in an action to collect a fine against

a union member for failure to picket during a strike. The union constitution and by-laws provided for the imposition of such a fine. Such provisions of the union constitution and by-laws were held to constitute a contract which the union was entitled to enforce by court action. Under the wording of the proviso of Section (b) (1) (A) of the Labor Management Relations Act, such a contract does not fall within the prohibitions of such Act. The aforequoted extract from the decision of the United States supreme court in *International Assn. of Machinists v. Gonzales, supra*, clearly indicates that the enforcement by state courts of rights arising under such a contract is too remotely related to the public interest sought to be protected by the Labor Management Relations Act to require a holding that there exists preemption under such Act.

The matters of public interest with which Congress sought to deal in enacting such Act are clearly made manifest by Section 1 thereof, 29 USCA, sec. 151. One expressed purpose of such enactment was to correct the "*inequality of bargaining power* between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" by encouraging and protecting the exercise by workers in employments affecting interstate commerce of free collective bargaining.

When the provisions of Section 7, together with that of the proviso of Section 8 (b) (1) (A), of the Act are construed together, it can well be argued that Congress has spelled out the balance of bargaining power it desires to maintain between unions and employees in employments affecting interstate commerce. This being so, then any at-

tempt by the states to regulate union activity in such a way as to disrupt such balance would be an invasion of a field of regulation already preempted by Congress. This is the view voiced by Professor Archibald Cox of Harvard Law School in an address to the Section of Labor Relations Law of the American Bar Association at its 1958 annual meeting (Report of the 1958 Proceedings of such Section, p. 21):

"Freedom of strike, to picket and to use other economic weapons affects the progress of union organization and the balance of power in collective bargaining. The progress of unionization and the balance of power affect the way collective bargaining works. . . . Since freedom to negotiate terms of employment implies freedom to reject the terms proposed by the other party, the framework necessarily includes the law of strikes and picketing. At each point formulating the national labor policy involved balancing the various interests of management, union, employees and public in union organization and collective bargaining as methods for establishing terms and conditions of employment. Any state law which affects the balance is inconsistent with the national labor policy embodied in the L. M. R. A. and, under the supremacy clause, cannot be applied in situations affecting interstate commerce."

A union without power to enforce solidarity among its members, when it resorts to a strike in an effort to force an employer to agree to its collective bargaining demands, is a much less effective instrument of collective bargaining than a union which possesses such power. Therefore, there is an intimate connection between the right of a union to fine members, who cross a picket line in order to continue to work during a strike called by the union, and the inci-

dents of collective bargaining sought to be regulated by the Labor Management Relations Act. In view of this, it is difficult for us to conceive that such union activity is of "a merely peripheral concern of the Labor Management Relations Act."

That there is an intimate connection between the ability of a union to fine a member, who crosses a picket line in order to continue to work during a strike called by the union, and collective bargaining is supported by an opinion rendered by the Court of Appeals for the Sixth Circuit in *Sanders v. International Assn. of Bridge, Structural & Ornamental Iron Workers* (1956), 235 Fed. (2d) 271. There the court had before it the issue of the legality of a provision in a union constitution which was broad enough in scope to permit the expulsion for life of a member found guilty of violating certain other provisions of such constitution. The plaintiff Sanders had been so expelled for life. In passing on such issue the court declared (at p. 272):

"[T]he legal right of the union to take such action is recognized in the Labor Management Act, 29 USCA, par. 158 (b) (1) (A), where it is provided that the law 'shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.' The expulsion and debarment of appellant Sanders for life was a valid exercise by the union of its powers under its constitution and a legal exercise of its rights under the pertinent statute. As has been well said, '*A union must have authority to discipline its members, otherwise it will have no power to bargain effectively.* [citing Note in Villanova Law Review, January, 1956, p. 190].'" (Emphasis supplied.)

Thus it is apparent that the arguments, in favor of holding that the activity of a union which fines a member for crossing a picket line in violation of the union's constitution and by-laws is protected by the Labor Management Relations Act, are too potent to permit us to determine that such activity is not "arguably within the compass of sec. 7 or 8 of the Act." This being the case, no state agency or court, but only the National Labor Relations Board, has jurisdiction to determine whether such activity is protected by the proviso of Section 8 (b) (1) (A) of the Act. *San Diego Unions v. Garmon, supra.*

There are at least three decisions of the National Labor Relations Board in which it has been called upon to interpret the effect of such proviso.

The first of these is *International Typographical Union* (1949), 86 NLRB 951. In that case one of the activities of the union, which was contended to be an act of coercion prohibited by Section 8 (b) (1) (A) of the Act, was threatening union members with expulsion if they failed to follow certain union prescribed collective bargaining procedures. The National Labor Relations Board held that such "argument is squarely at odds with the unambiguous language of the proviso to Section 8 (b) (1) (A), and the legislative scheme as a whole, and must therefore be rejected." By footnote to this holding the board quoted the language of such proviso and stated:

> "It is unnecessary to do more than to mention the *guarantee of a right* to 'prescribe' rules extends to the enforcement of such rules as well." (Emphasis supplied.)

The second pertinent decision of the National Labor Relations Board interpreting such proviso is that of *Minneapolis Star and Tribune Co.* (1954), 109 NLRB 727. There the board was concerned with a $500 fine which had been imposed by the union on a member, one Carpenter, because of his failure to take part in picketing during a strike. The board approved the holding of its trial examiner that the proviso of Section 8 (b) (1) (A) of the Labor Management Relations Act precluded it from interfering with the imposing of such fine by the Union. There was incorporated into the decision the report of the trial examiner. It appears from such report that the general counsel for the board took the position that the imposition of such fine constituted an act of coercion prohibited by such Section 8 (b) (1) (A). The trial examiner rejected such contention and declared (at p. 738):

"Congressional recognition of a labor organization's right to make its own rules presumes, of course, its right to invoke them—except where the implementing of such rules is expressly prohibited, as in the case of affecting an employee's employment rights."[1]

One of the most recent decisions by the National Labor Relations Board, in which it was called upon to interpret such proviso is *Allen Bradley Company* (1960), 127 NLRB No. 8. There the company, as a condition to entering into a new collective bargaining agreement with the union, insisted that the union agree in principle to certain company proposed contract clauses. Under these clauses the union

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[1]In the instant appeals no question was raised that the provisions of the Union's constitution and by-laws providing for the imposition of the fines upon the employees, who crossed the picket lines, violated the employment rights of such employees.

would be precluded from restraining or coercing any of its members by "discipline, discharge, fine or otherwise" from exercising any of their rights guaranteed by Section 7 of the Labor Management Relations Act. Thus such a clause would have prohibited the Union from fining members who crossed a picket line and continued to work during a strike in violation of the union's constitution and by-laws. The board in its decision stated:

"Respondent [employer] has, by the breadth of this clause, encompassed in its proposals, and sought to bargain about, virtually every form of internal union discipline, including disciplinary powers expressly reserved to unions by the proviso to Section 8 (b) (1) (A) of the Act. . . . By thus intruding on *rights guaranteed* to Unions by the Act, Respondent's proposed clauses clearly fell outside the scope of mandatory bargaining. Accordingly, we find that Respondent violated Section 8 (a) (5)[2] by insisting at negotiations that the Union agree to such proposals." (Emphasis supplied.)

The foregoing quotations from decisions of the National Labor Relations Board make it abundantly clear that such board interprets the proviso as having the effect of making the enforcement by a union of its own constitution and by-laws a protected activity under the Labor Management Relations Act. We deem that such interpretation is certainly a permissible one in view of the use by Congress of the word "*right*" in the proviso when referring to the union activity of prescribing rules for acquisition and retention of membership.

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[2]Sec. 8 (a) (5) of the Act is the provision which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

Therefore, we conclude that such interpretation by the National Labor Relations Board is controlling on the issue of preemption, and that W. E. R. B. was without jurisdiction in the instant proceedings.

By the Court. Judgments reversed and causes remanded with directions in Case No. 59 to vacate and set aside the order of the Wisconsin Employment Relations Board.

Dated: October 4, 1960

OPINION OF WISCONSIN SUPREME COURT

Nos. 81 & 82
August Term, 1960

STATE OF WISCONSIN : IN SUPREME COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Appellant.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

APPEAL from two judgments of the Circuit Court for Milwaukee county: ELMER W. ROLLER, Circuit Judge. *Reversed.*

In Case No. 81 the Wisconsin Employment Relations Board (hereinafter referred to as "W. E. R. B.") petitioned the circuit court pursuant to sec. 111.07 (7), Wis. Stats., for enforcement of an order by W. E. R. B. requiring Lodge 78 of the International Association of Machinists, AFL-CIO (hereinafter referred as the "Union"), to cease and desist from attempting to collect certain fines from twelve of its members. In Case No. 82 the Union petitioned the circuit court pursuant to the Wisconsin Administrative Procedure Act (ch. 227, Stats.) for review of this same order entered by W. E. R. B. The two proceedings were consolidated by the circuit court for the purpose of hearing and determination.

At all times material to the instant litigation the Union was the certified collective bargaining agent for the employees employed in the tool room of the Milwaukee plant of the Allen-Bradley Company (hereinafter referred to as the "Company"). The Company is one whose business affects interstate commerce within the meaning of the Labor Management Relations Act, 1947. On September 1, 1956, the Union called a strike at such plant, which strike terminated in the last week of such month.

During the strike fourteen members of the Union crossed the Union's picket line and continued to work for the Company. After the conclusion of the strike such fourteen members were tried by the Union on charges that their conduct constituted a violation of the Union's constitution and by-laws, and each was fined $100. Such members made no appearance before the trial committee and were tried *in absentia*. Demand was made upon each of the fourteen for payment of such fines and on January 24, 1957,

the Union instituted fourteen separate actions in the civil court of Milwaukee county to collect such fines. Such actions are still pending.

The fourteen affected employees filed charges with the National Labor Relations Board accusing the Union of an unfair labor practice in levying such fines and attempting to collect them. The general counsel for such board in Opinion F-198, dated October 28, 1957, refused to take action on the ground that the conduct of the Union was not an unfair labor practice under the proviso appearing in Section 8 (b) (1) (A) of the Labor Management Relations Act, 29 USCA, sec. 158 (b) (1) (A).

Two of the fourteen employees filed an action in the United States District Court for the District of Columbia to compel the National Labor Relations Board and its general counsel to issue a complaint against the Union, which litigation is also pending.

The remaining twelve of these fourteen employees filed complaints with W. E. R. B. charging the Union with an unfair labor practice under the Wisconsin Employment Peace Act (ch. 111, Wis. Stats.). In its answers the Union alleged that W. E. R. B. had no jurisdiction to act in the matter and denied that any violation of the Wisconsin Act had been committed.

The hearing before the W. E. R. B. was held on August 28, 1958, at which time all of the facts were stipulated by counsel. On November 21, 1958, W. E. R. B. made certain findings of fact and conclusions of law which held that the activities of the Union were regulated by the Labor Management Relations Act, as amended, and that, there-

fore, W. E. R. B. had no jurisdiction of the subject matter. W. E. R. B. unanimously dismissed the complaints.

On December 9, 1958, complainants moved W. E. R. B. for a rehearing, and on January 14, 1959, such motion for rehearing was granted. Hearing was again held by W. E. R. B. on February 4, 1959, at which time further argument was had and no further facts adduced.

On April 27, 1959, two of the three members of W. E. R. B. filed amended findings of fact and conclusions of law in which they found that W. E. R. B. had jurisdiction of the subject matter and that a violation of the Wisconsin Employment Peace Act was committed. Affixed to such findings and conclusions was an order directing the Union to cease attempting to collect the fines imposed and to set aside the fines. The two member majority also filed a memorandum accompanying such order.

The minority member filed a memorandum of dissent in which he objected to W. E. R. B. asserting jurisdiction; he further disagreed with the majority holding that a violation of state law had been committed.

The Union then petitioned for review of such order in the circuit court, and W. E. R. B. sought a judgment of enforcement of its order from such court. Separate judgments in each proceeding were entered under date of April 22, 1960. One dismissed the Union's petition for review and the other decreed enforcement of W. E. R. B.'s order. From such judgments the Union has appealed.

CURRIE, J. The same issue of federal preemption under the Labor Management Relations Act, 1947, 29 USCA, secs. 151-187, is presented here as in *United Automobile*

A. & A. I. Workers v. Wisconsin Employment Relations Board, ante, p. 000, 000 N. W. (2d) 000. Therefore, our decision this day rendered in such case governs the outcome in the instant appeals, and requires that the judgments below be reversed.

By the Court. Judgments reversed with directions in Case No. 8: that the order of the Wisconsin Employment Relations Board be vacated and set aside.

Dated October 4, 1960

OPINION OF MILWAUKEE COUNTY CIRCUIT COURT

STATE OF WISCONSIN : CIRCUIT COURT
MILWAUKEE COUNTY : BRANCH 5

CASE NO. 284-888

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

Petitioner.

-vs-

WISCONSIN EMPLOYMENT RELATIONS BOARD.

Respondent.

CASE NO. 285-229

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Petitioner.

-vs-

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

Respondent.

MEMORANDUM DECISION

There are two proceedings before the court.

The first (Case No. 284-888) is a petition brought by Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, ALF-CIO, praying that the decision (No. 5314) of the Wisconsin Employment Relations Board be reviewed to the end that it be reversed and the proceedings held before the Board in Case No. XXV No. 7432 CW-265 and Case No. XXVI No. 7433 CW-266 be dismissed.

The second proceeding is under section 111.07 (7), Stats., for a judgment and decree confirming and enforcing the amended order of the Board made in those cases and proceedings.

These two proceedings involve the same issues and for that reason they are consolidated.

Local 248, a voluntary labor organization, affiliated with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, was at all times pertinent hereto, recognized by Allis-Chalmers Manufacturing Company as the sole and exclusive bargaining agent for certain of its employees (including employee complainants before the Board) at its West Allis plant.

On February 2nd, 1959, Local 248 and the International Union called a strike of all the employees who were represented by Local 248 at the Employer's West Allis plant.

During the strike the employee complainants before the Board, members of Local 248, crossed the Union's

picket lines and performed work for the employer at various times.

A statement by the President of Local 248, at a membership meeting on February 7th, 1959, that any employee crossing the picket lines and working during the strike would be tried by the Union and fined after the strike, which statement appeared in the press, together with letters from Local 248 under date of May 5th, 1959, informing employee complainants that they had been charged with violating the Union's picket lines and that a trial committee would be selected to try them pursuant to the International's constitution, formed the grounds for complaints of unfair labor practices under sections 111.06 (2) (a) and 111.06 (3), Stats., filed with the Board by the Employer (Case No. XXV No. 7432 CW-265) and by nineteen employees (Case No. XXVI No. 7433 CW-266) against the Local and International.

The strike was settled and employees returned to work under a new contract on April 20th, 1959.

The employer is engaged in and the Union represents employees engaged in a business affecting interstate commerce within the meaning of the Labor Management Relations Act, 1947, as amended.

The Board, under date of September 28th, 1959, made Findings of Fact and Conclusions of Law in both cases wherein it concluded that the activities of the Unions were neither prohibited nor protected by the Labor Management Relations Act, 1947, as amended, that the Local had committed an unfair labor practice in that by threatening to impose fines the Local attempted to coerce and intimidate

the employee complainants and others similarly situated in the emjoyment of their legal rights including the right guaranteed in section 111.04 to refrain from engaging in concerted activities for the purposes of collective bargaining.

Subsequent to the Board's Findings and Conclusions, and on October 20th, 1959, the parties, by counsel, stipulated that facts relative to certain actions taken by the Local since the close of the testimony be incorporated in the record and authorized the Board to amend its Findings, Conclusions and Order of September 28th, 1959, in conformity therewith.

Those stipulated facts are that employee complainants and others similarly situated were tried upon charges of conduct unbecoming union members by two Trial Committes, found guilty of the charges and fined in amounts varying from $15.00 to $100.00; that the reports of the Trial Committees were duly adopted by the membership of Local 248 on September 12th, 1959; and on or about September 18th, 1959, the Recording Secretary of Local 248 addressed a communication to each of the employee complainants and others similarly situated informing them that the entire membership had upheld the Trial Committee as to their decisions and fines and demanding payment; that all proceedings in connection with the trials and imposition of the fines were in accordance with the Constitution of the International.

Accordingly the Board amended its Findings to include the stipulated facts and amended its Order directing Local 248 to cease and desist attempting to impose, imposing or enforcing any punishment upon any employee as well as

threatening any employee with punishment by the imposition of a fine.

The questions involved in these proceedings are identical to those considered and determined under the fourth and fifth issues in Wisconsin Employment Relations Board, Petitioner, v. Lodge 78, of the International Association of Machinists, AFL-CIO, Respondents, Case No. 281-203, and Lodge 78, of the International Association of Machinists, AFL-CIO, Petitioner, v. Wisconsin Employment Relations Board, Respondent, Case No. 281-417.

The decision in those cases is controlling here.

The court has had the benefit of additional able oral argument and extensive briefs in these proceedings and respectfully submits that there is nothing which would require a change in that decision.

As noted in the decision the court is of the opinion that the activity of the Union here made the basis of complaint under the Wisconsin Employment Peace Act is neither prohibited nor protected under the Labor Management Relations Act. As pointed out by counsel for the Union there is a close identity in the language of Sections 7 and 8 (b) (1) (A) of the National Act and Sections 111.04 and 111.06 (2) (a) of the Wisconsin Employment Peace Act, respectively. But Section 8 (b) (1) (A) of the National Act contains the proviso. Both sides find support for their contentions in the proviso. And as this court understands the decision of the National Board in *Minneapolis Star and Tribune Co.*, 109 N. L. R. B. 727, the imposition of fines by a Union is an internal affair of a labor organization not within the scope of federal prohibition. The proviso, it was

there held, is a limitation on the definition of an unfair labor practice in Section 8 (b) (1) (A). An analogous question was presented in *Algoma Plywood & Veneer Co. v. Wisconsin Emp. Rel. Board*, 336 U. S. 301, 69 S. Ct. 584, 94 L. Ed. 691, 699, which concerned the proviso in Section 8 (3) relating to union-security agreements. There the court said: "It is argued, therefore, that a state cannot forbid what Section 8 (3) affirmatively permits. The short answer is that Section 8 (3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of the words 'nothing in this Act . . . or in any other statute of the United States,' and it is confirmed by the legislative history."

Counsel for the Union argues for federal pre-emption on the basis that the National Board has taken jurisdiction in the exact area with which we are here concerned and also that both the National Board and the courts have upheld Section 8 (b) (1) (A). In support of these statements counsel refers to *International Typographical Union*, 86 N. L. R. B. 951; *American Newspaper Publishers Association v. N. L. R. B.*, 193 F. (2d) 782; *International Brotherhood of Teamsters, Local 294*, 87 N. L. R. B. 972; as well as *Minneapolis Star and Tribune Company*. The argument is valid only if it may be concluded from these cases that the activity here is protected by the proviso to Section 8 (b) (1) (A). This court is of the opinion that these cases are not authority for such ruling. The question was not before the court in *United Automobile, A. & A. I. Workers v. Woychik*, 5 Wis. (2d) 528. And in *International Association of Machinists v. Gonzales*, 356 U. S. 617, 78 S. Ct. 923,

2 L. Ed. (2d) 1018, it was held that states are free to regulate matters within the scope of the proviso. It is true, as counsel points out that the case involved a contractual right of a union member with respect to his union and not a public right. This counsel states is a material difference which distinguishes *Gonzales* from the instant case. The court has given consideration to this contention but concludes from a study of the *Gonzales* case that the reference to respondent's private right was to distinguish the remote possibility of conflict with a federal unfair labor practice under Section 8 (b) (2) of the National Act. The Court is of the opinion that it is not a distinguishing difference.

The court is of the further opinion that there is no federal preemption here under the second *San Diego Building Trades Council v. Garmon*, 359 U. S. 241, 79 S. Ct. 773, 779, 3 L. Ed. (2d) 775. There the court said:

> "At times it has not been clear whether the particular activity regulated by the States was governed by Section 7 or Section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."
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> "* * * The adjudication in California has throughout been based on the assumption that the behavior of the—petitioning unions constituted an unfair labor practice."

If the court is correct in its impression of the *Gonzales Case*, then the activity here is not arguably subject to Section 7 or Section 8 of the National Act. And the National Labor Relations Board has made its decision in the first instance. *Minneapolis Star and Tribune Company, supra.*

The court is also of the opinion that there is no preemption here under the proviso to Section 101 (a) (2) of the Labor-Management Reporting and Disclosure Act of 1959.

Most cases cited by counsel for the Union in connection with union discipline as specifically protected were also cited in the Lodge 78 cases. All have been considered.

In the reply brief it is the position of counsel for the Union that the mere fact that the National Board ruled that the activity of the Union was not prohibited under the proviso to Section (b) (1) (A) *(Minneapolis Star and Tribune Company)* does not cede to the states jurisdiction over the subject matter, citing *Guss v. Utah Labor Relations Board*, 353 U. S. 20, 77 S. Ct. 607, 1 L. Ed. (2d) 618. With this view the court respectfully differs.

In the *Guss Case* the Supreme Court of Utah had held that the Utah Labor Relations Board had jurisdiction over unfair labor charges filed by the Union. (5 Utah (2d) 68, 296 P. (2d) 733). On appeal that decision was reversed, the court holding that the State Board had no power to deal with unfair labor charges falling within the jurisdiction of the National Board where the latter had declined to exercise its jurisdiction but had not ceded jurisdiction to the State Board. The question presented by the case, as well as by *Amalgamated Meat Cutters, etc. v. Fairlawn*

Meats, Inc. and *San Diego Building Trades Council v. Garmon, supra*, the court said, was whether Congress, by vesting in the National Board, jurisdiction over labor relations matters affecting interstate commerce, "has completely displaced state power to deal with such matters" where the National Board has declined to exercise its jurisdiction or obviously would decline to exercise its jurisdiction, but has not ceded jurisdiction pursuant to Section 10 (a) of the National Act. The uncontroverted premises were: (1) employer's business affected inter-state commerce and the National Labor Relations Board had jurisdiction, (2) the National Act deals with the conduct charged to the employer which was the basis of the state tribunals' action, (3) the National Board had not entered into any agreement ceding jurisdiction to the State Board pursuant to Section 10 (a) of the National Act. On these facts the court concluded:

> "We hold that the proviso to Sec. 10 (a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board. We find support for our holding in prior cases in this Court. In *Amalgamated Asso. S. E. R. M. C. E. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 397, 398, 95 L. ed. 364, 377, 71 S. Ct. 359, 22 A. L. R. (2d) 874, the Court said: 'The Legislative history of the 1947 Act refers to the decision of this Court in Bethlehem Steel Co. v. New York Labor Board, 330 U. S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation "pre-empts the field that the act covers insofar as commerce within the meaning of the acts is concerned" and demonstrated its ability

to spell out with particularity those areas in which it desired state regulation to be operative. (Footnotes omitted.)' "

In the opinion of this court the principle of the *Guss Case* has no application in a situation where the federal substantive law does not deal with a particular kind of conduct. The National Board has made its determination in *Minneapolis Star and Tribune Company* that the activity here involved is not prohibited by federal law.

The order of the Wisconsin Employment Relations Board is affirmed and the petition of the Board for judgment confirming and enforcing the order is granted.

(All without costs.)

An order in conformity herewith may be presented.

Respectfully submitted,

ELMER W. ROLLER
Circuit Judge

Dated: April 11, 1960

OPINION OF MILWAUKEE COUNTY CIRCUIT COURT

STATE OF WISCONSIN : CIRCUIT COURT
MILWAUKEE COUNTY : BRANCH 5

CASE NO. 281-203

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner.

-vs-

LODGE 78 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Respondent.

CASE NO. 281-417

LODGE 78 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Petitioner.

-vs-

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

MEMORANDUM DECISION

There are two proceedings before the court:

The first is under section 111.07 (7), Stats., for the enforcement of an order (amended) of the Wisconsin Employment Relations Board directing that the respondent immediately cease and desist attempting to collect the fine imposed on each of the complainants and to take steps setting aside such fine and for other relief as the facts and circumstances may warrant.

The second proceeding is a petition brought by Lodge 78 of the International Association of Machinists, AFL-CIO, pursuant to section 227.16, Stats., for a review of that order.

The proceedings are consolidated for the reason that they involve the same issues.

The facts are not in dispute. The twelve complainants were, at the times pertinent hereto, and are employed in the tool room of the Allen-Bradley Company, at Milwaukee. The respondent Union was, at the times pertinent hereto, and is the duly certified bargaining agent of the employer's tool room employees. On or about September 1st, 1956, the respondent Union called a strike of the employer's tool room employees. The complainants were members of the respondent Union, but continued to work during the strike and in doing so crossed the picket line established by the Union. The strike terminated in the last week of September, 1956, and, subsequently, in accordance with its constitution and by-laws, respondent Union levied individual fines of $100.00 against each of complainants because they had continued working during the strike. In December, 1956, each complainant received a letter from counsel demanding payment of the fine; none complied and on January 24th, 1957, each was served with process in an action in the Civil Court of Milwaukee County seeking judgment for the amount of the fine. These twelve actions are now pending. Additionally it is conceded that eleven of the twelve complainants received notice to appear before a committee of the Union prior to the imposition of the fines. That notice is not in the record, but in any event, the Board found, both in its original and amend-

ed findings, that the fines were levied in accordance with the Union's constitution and by-laws. It is also undisputed that the Union made no demands upon the employer with respect to the tenure or conditions of employment of any of the complainants.

On these facts, the twelve employees each filed a complaint with the Board charging respondent Union with a violation of section 111.06 (2) (a), Stats., in that respondent is coercing and intimidating complainant in the exercise of his legal right "to refrain from the concerted activity of the respondent during the period of time that respondent maintained a strike and a picket line" and charging that said conduct is a continuing unfair labor practice.

Respondent-Union filed identical answers to each complaint, in substance: (1) denying jurisdiction of the Wisconsin Employment Relations Board on the ground that the activities complained of constituted a violation of Section 8 (b) (1) of the Labor-Management Relations Act of 1947, as amended, (2) alleging that the activities complained of as constituting an unfair labor practice are specifically protected under the Labor-Management Relations Act, (3) alleging that such activities were in lawful exercise of its rights to discipline its own members under its constitution.

Certain facts in connection with the proceedings are made the basis of objections by the Union. These are here specifically noted:

(1) It is noted that counsel for the defendants in the Civil Court actions appeared specially challenging the

court's jurisdiction. The court overruled the special appearances.

(2) The fines were imposed in October, 1956. The actions to recover judgments thereon were commenced in the Civil Court by the service of a summons and complaint on each defendant in January, 1957. The employee complaints charging in each instance an unfair labor practice were filed with the Board in July and August, 1958. This chronology of proceedings is made the basis of objection by the Union.

(3) On July 21st, 1958, the Board made its first decision and order dismissing all of the complaints. That order was based on the finding and conclusion that the activities of the Union, which are the subject matter of each individual complaint, were of such nature that they are regulated by the Labor-Management Relations Act, as amended. The Board was, therefore, of the opinion that it had no jurisdiction in these matters.

Following that first decision the complainants made a motion for a rehearing, petitioning the Board to reconsider its decision and order of November 21st, 1958. That motion was filed with the Board on December 10th, 1958. The Board by an order dated January 14th, 1959, granted the motion for "further hearing" and set January 20th, 1959, as the date of the further hearing. The order recites that the complainants moved for such further hearing on the 9th day of December, 1958.

Both the date of the motion and the date of the Board's order are also relied upon by the Union in its opposition

to the proceeding for the enforcement of the Board's final order and in support of its petition for review.

The entire matter was re-argued on February 4th, 1959, and on April 27th, 1959, the majority of the Board made Amended Findings of Fact, Conclusions of Law and an Order reversing its prior order with respect to the jurisdictional question.

(Portions of opinion relative to other issues omitted.)

* * *

4.

Does the Wisconsin Employment Relations Board have jurisdiction of the subject matter of the action?

Lodge 78 contends that the Labor Management Relations Act of 1947, as amended, has pre-empted this area of activity with respect to employers engaged in interstate commerce and unions representing employees working for employers engaged in interstate commerce. Hence, the Union states, this issue must be resolved in the negative.

Complainants concede that the State may not prohibit under its labor statute conduct which has been made an unfair labor practice under the federal statutes, *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546; *Garner v. Teamsters Union* (1953), 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228; and further that the State is ousted of jurisdiction to prevent the exercise of rights guaranteed by said federal legislation. *Amalgamated Assn., etc. v. Wisconsin Employ. Rel. Bd.* (1951), 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364; 257 Wis. 43, 42 N. W. (2d) 471.

But, they say, the area of activity with which we are here concerned has not been made an unfair labor practice on the part of the Union by the National Act; and, further, neither is it protected by the National Act. They contend, therefore, that it is an area left to the State in which the State may regulate.

The pertinent sections of the Labor Management Relations Act provides as follows.

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."
>
> "Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *"

The pertinent sections of the Employment Peace Act read as follows:

> "111.04 *Rights of employees.* Employes shall have the right of self-organization and the right to form, join, or assist organizations, to bargain collectively

through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

"111.06 *What are unfair labor practices.*

* * * * * * * * * * * *

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04. * * *"

And see also Section 111.06 (3).

Singularly enough both sides find authority for their contentions in *International Ass'n. of Machinists v. Gonzales* (1958), 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. (2d) 1018, where it was held that the state court, in an action by a union member against the international and local unions for restoration of his membership and damages due to his expulsion in violation of his rights under the constitution and by-laws of the unions, had power to award him damages due to his illegal expulsion. The court said:

(S. Ct. Rep. p. 924)

"(2,3) The crux of the claim sustained by the California court was that under California law membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union and that state law provides, through mandatory reinstatement and damages, a remedy for breach of such contract through wrongful expulsion. This contractual

conception of the relation between a member and his union widely prevails in this country and has recently been adopted by the House of Lords in Bonsor v. Musicians' Union (1956), A. C. 104. * * *"

(S. Ct. Rep. p. 926)

"* * * The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under section 8 (b) (2). This important distinction between the purposes of federal and state regulation had been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands-off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union: the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.' Isaacson, Labor Relations Law: Federal versus State Jurisdiction, 42 A. B. A. J. 415, 483."

From here the complainants proceed to the conclusion that if the state has jurisdiction over the contractual relation for the purposes of enforcement, then "It also must have jurisdiction for all the usual regulatory procedures in the contractual field" and may determine whether the pro-

visions are illegal so that an attempt to enforce them falls within the field of arbitrariness and misconduct in which the individual members and the Union are in opposition.

Whether the arbitrary conduct of the unions constituted an unfair labor practice under the National Act was not an issue in the *Gonzales Case*. The Union asserts, therefore, that it concerns private rights created by contract and is not authority on the issue in the instant case of whether the Union by fining its members committed unfair labor practices under Sections 7 and 8 (b) (1) (A) of the National Act which it is said is a matter of public rights under the federal and state acts.

The question was directly presented in *Minneapolis Star and Tribune Company* (1954), 109 NLRB 727 (Cases Nos. 18-CA-579 and 18-CB-55) where the National Board held that the imposition of a $500.00 fine by the Union on a member for his failure to engage in certain of its activities was not a violation of Section 8 (b) (1) (A) of the National Act. In so ruling the National Board held that the proviso to Section 8 (b) (1) (A) ("* * * Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein") *precludes* interference with the internal affairs of a labor organization.

Earlier the National Board in *International Typographical Union* (1949), 86 NLRB 951, 957 (Case No. 9-CB 5) had said: "In our view, by including this *proviso* Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of Section 8 (b) (1) (A), irrespective of any ulterior reasons motivating the union's application of

such rules or the direct effect thereof on particular employees." In affirming the Board in *American Newspaper Publishers' Assn. v. N. L. R. B.* (1951), 193 F. (2d) 782, the court held that the proviso "is attached to section 8 (b) (1) (A) as a limitation to this particular definition of an unfair labor practice" and permits labor unions to enforce their internal policies upon their membership as they see fit. The court said:

> "* * * In this section of the Act Congress has said that only such action was illegal which would 'not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.' Under this limitation Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, as far as section 8 (b) (1) (A) is concerned. This interpretation has support in the legislative history of the Act. It is also significant that while the Board has been so interpreting this section of the Act during the past four years, Congress has not amended the section to indicate that a broader interpretation of the section was intended or desired. It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope."

In *American Newspaper Publishers' Assn.* as well as in *Teamsters Local 294* (1949), 87 NLRB 972 (Cases Nos. 2-CC-14 and 2-CC-12) specific activity was the union's threat to expel an employee from union membership.

On well established authority, then, the imposition of the fines in the case at bar by the Union on the complainants is not an unfair labor practice under the federal act.

But the Union contends that the proviso goes further, that it indicates (expressly and, *arguendo*, inferentially) Congressional intent to pre-empt the field specifically in this area of labor management relations and protects the Union "from the prohibition of restraining or coercing employees (by the state) as long as such restraints or coercions are governed by internal union rules."

In the considered judgment of this court these contentions cannot stand in the face of the clear pronouncement of the United States Supreme Court in *International Ass'n. of Machinists v. Gonzales, supra.* The court there said:

(U. S. Rep. p. 620; S. Ct. Rep. p. 925)

"* * * But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to section 8 (b) (1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.' 61 Stat. 141, 29 U. S. C. section 158 (b) (1), 29 U. S. C. A. section 158 (b) (1). The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of

congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Construction Workers, etc. v. Laburnum Constr. Corp.*, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025."

It is true as pointed out by counsel that the *Gonzales Case* concerned private rights created by contract, not an unfair labor practice. But in the opinion of the court, that fact is not material to the question of the state's jurisdiction.

The court is of the opinion that the state is not here ousted of its traditional jurisdiction. See *Algoma Plywood & Veneer Co. v. Wisconsin E. R. Board* (1949), 336 U. S. 304, 307, 69 S. Ct. 584, 93 L. Ed. 691, and *International Union v. Wisconsin E. R. Board* (1947), 250 Wis. 550, 569, 27 N. W. (2d) 875.

The court has considered *San Diego Building Trades Council, etc. v. Garmon* (second Garmon case 1959), 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. (2d) 775, and is of the opinion that it contains nothing at variance with this conclusion.

It should be here noted that the complainants filed unfair labor practice charges with the National Labor Relations Board and the General Counsel of the National Board on October 28th, 1957, refused to issue complaint against the Union, finding no violation of the federal act.

In the second *Garmon Case* the court said that it was arguable that the activity of the Union fell within the compass of the protected "concerted activities" provision of Section 7 or was an unfair labor practice under Section 8, of the National Labor Relations Act; therefore, the state

jurisdiction to award damages (as well as to grant the injunctive remedy) was displaced. Upon determination by the National Board that particular conduct is protected by Section 7, or prohibited by Section 8, of the National Labor Relations Act (29 U. S. C. sec. 157, 158), the states, the court held, are ousted of all jurisdiction with respect to such conduct. But, the court pointed out:

> "(8-10) * * * In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.
>
> "(11) In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Sec. 7 or Sec. 8 of the Act, the State's jurisdiction is displaced."

In the case at bar the activity or conduct is not governed by either sections 7 or 8 of the National Act. *International Ass'n. of Machinists v. Gonzales, supra.* And in the court's view the National Board has made its decision "in the first instance," that the activity is neither protected nor prohibited by federal law. *Minneapolis Star & Tribune Co.* (1954, N. L. R. B.), *supra.* The danger of conflict with national labor policy is not involved.

5.

Is the imposition of a fine, under the circumstances, an unfair labor practice under Section 111.06 (2) (a), Stats.?

Section 111.06 (2) (a), Stats., is set forth on pages 18 and 19 of this decision. See also Section 111.04, Stats., likewise set forth on 18 hereof.

This issue involves these questions: (a) Is the imposition of a fine coercive? (b) Is the contract (constitution, by-laws) between the member and his union invalid as violative of Section 111.06 (2) (a), Stats.? (c) May a member waive his rights under the statute?

The present issue involves an area of practical conflict between the asserted right of a labor organization to discipline its recalcitrant members by the imposition of a fine, here its members who violate its constitutional regulations in a respect which labor organizations regard with serious concern and antipathy, and the state statute.

(a)

Counsel for Lodge 78 states, in effect, that the Board's decision opens a pandora's box of problems. A strong appeal is made, both on oral argument and by brief, based on the common law right of labor organizations with respect to their internal management to enforce obedience to their by-laws and regulations by fines and other suitable penalties. See 31 *Am. Jur.* Labor, Section 50; *Rhodes Bros. Co. v. Musicians' P. U., Local No. 198, A. F. of M.* (1915), 37 R. I. 281, 92 A. 641, 643; *L. D. Willcutt & Sons Co. v. Bricklayers' Benev. & P. U. No. 3* (1908), 200 Mass. 110, 85 N. E. 897, 901.

There is no doubt in the court's mind that the Board's decision here does not bring into question the well established rights of labor organizations in the management of their internal affairs to impose fines and reasonable penalties for absence from meetings, tardiness in attendance, delinquencing in payment of dues and other infractions of rules designed and intended for their international operation and management. The decision of the Board is to be given no legal implications beyond the ruling on the facts of the case.

The common law right of a labor organization to enforce obedience to its by-laws and regulations by fines and penalties is not an absolute one. 31 *Am. Jur.* Labor, Section 50; *Oakes, Organized Labor and Industrial Conflicts*, Section 15; *Rhodes Bros. Co. v. Musicians' P. U. Local 198, A. F. of M. supra; L. D. Willcutt & Sons v. Bricklayers' Benev. & P. U. No. 3, supra.*

In the *Willcutt Case*, also cited by counsel for Lodge No. 78, the court said:

> "So long also as the by-laws of a union relate to matters in which no one is interested except the association and its members, and violates no right of a third party or no rule of public policy, they are valid. Fines may be imposed, for instance for tardiness, absence, failure to pay dues, or for misconduct affecting the organization or any of its members; and for numerous other acts. It cannot be contended, however, that as against the right of some party other than the association and its members an act, otherwise a violation of the third party's rights, is any less a violation because done by some member in obedience to a by-law. * * *"

And it is asked in the Lodge No. 78 cases: "How can a fine be coercive as applied to the recalcitrant employees when it was imposed after they had violated the Union's by-laws and regulations?" And it is not the sole answer to say that the Board made such finding. But it does appear that the Board's determination finds support in authorities bearing on the question of coercion. *Chicopee Mfg. Corporation of Georgia and Textile Workers Union of America, CIO*, 85 NLRB 1439; *National L. R. Board v. Illinois Tool Works* (CCA 7, 1946), 153 F. (2d) 811.

In *Wisconsin E. R. Board v. Journeymen Barbers* (1956), 272 Wis. 94, 97, 74 N. W. (2d) 821. The Board found that a barber quit his work because of a provision in the Union's constitution which subjected him to suspension and penalties if he continued to work in a barber shop where the union shop card was not displayed. The proprietor filed a complaint charging an unfair labor practice. The court stated: "It would appear to be clear that any enforcement of such provision in the union's constitution under the facts of the instant case would constitute coercion exercised against the employer McMaster to compel him to rejoin Guild No. 27. Such coercion constitutes a violation of sec. 111.06 (2) (m), Stats."

See also *Retail Clerks' Union v. Wisconsin E. R. Board*, 242 Wis. 21, 6 N. W. (2d) 698.

The trial examiner in *Minneapolis Star and Tribune Company, supra*, found the imposition of a $500.00 fine for the failure of a union member to take part in picketing, coercive, although not violative of the National Act. The intermediate report (page 738) contains this conclusion: "There can be little question, of course, but that the impo-

sition of a $500.00 fine is a noticeable form of coercion." See also *L. D. Willcutt & Sons Co. v. Bricklayers' Benev. & P. U. No. 3, supra.*

(Portions of opinion relating to other issues omitted.)

* * *

In any event, this court does not have the final word. It is sufficient to say that from a careful study of the cases the court is constrained to the opinion that the state is not ousted of jurisdiction and the order of the Board must be confirmed.

Accordingly:

The order of the Wisconsin Employment Relations Board is affirmed and the petition of the Board for judgment confirming and enforcing the order is granted.

(All without costs.)

An order in conformity herewith may be presented.

Respectfully submitted,

ELMER W. ROLLER
Circuit Judge

Dated: April 8, 1960

FINDINGS AND ORDER OF WISCONSIN EMPLOYMENT RELATIONS BOARD

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

Case No. XXV No. 7432 Cw-265 Decision No. 5314-A

ALLIS-CHALMERS MANUFACTURING COMPANY,
Complainant,

v.

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO
and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Respondents.

Case XXVI No. 7433 Cw-266 Decision No. 5314-A

GREYDON ABENDROTH, EARL CHAMPEAU, ELMER EGGEBRECHT, JEAN EGGEBRECHT, HARRY GADOUAS, BERNICE GEROW, ALFRED KINNEY, RICHARD LEFFLER, GERALD MORITSCH, ALEX OLIVETTI, LEONARD PHINNEY, PAUL ROESSEL, ANTHONY SARA, FREDERICK UEBELE, MICHAEL VOIT, EARL WINTER, HENRY WOLAK, JOHN WOLAK, JOHN WULF,

Complainants.

v.

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,

Respondents.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Board having heretofore and on the 28th day of September, 1959, made and filed Findings of Fact, Conclusions of Law and Order, and the parties thereafter, and on the 22nd day of October, 1959, having filed a stipulation of facts, reflecting certain events occurring after the conclusion of the hearing in the matter and having jointly

requested that the Board modify its Findings of Fact, Conclusions of Law and Order;

NOW, THEREFORE, it is

ORDERED

That the stipulation of facts, together with the exhibits attached thereto, filed with the Board on October 22, 1959, be and the same hereby are made a part of the record in this matter, and further that the Findings of Fact, Conclusions of Law and Order heretofore made and entered by and the same hereby are modified to read as follows:

AMENDED FINDINGS OF FACT

1. That the Complainant Allis-Chalmers Manufacturing Company is a Delaware corporation duly authorized to transact business in the state of Wisconsin and is engaged in the operation of a manufacturing plant in the city of West Allis, Wisconsin.

2. That the individual Complainants:

Greydon Abendroth
Earl Champeau
Elmer Eggebrecht
Jean Eggebrecht
Harry Gadouas
Bernice Gerow
Alfred Kinney
Richard Leffler
Gerald Morftsch

Alex Olivetti
Leonard Phinney
Paul Roessel
Anthony Sara
Frederick Uebele
Michael Voit
Earl Winter
Henry Wolak
John Wolak
John Wulf

are all employes of the Allis-Chalmers Manufacturing Company, employed at their manufacturing plant in the city of West Allis, Wisconsin.

3. That the Respondent Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a voluntary labor organization having its principal office at 811 West Greenfield Avenue, West Allis 14, Wisconsin.

4. That the Respondent International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, is a labor organization with which Respondent Local 248 is affiliated and has its principal office at the city of Detroit, Michigan.

5. That at all times relevant hereto, Respondent Local 248 has been recognized by the Company as the sole and exclusive bargaining agent for certain of its employes including the individually named Complainants at its West Allis works.

6. That at 11:00 in the forenoon on February 2, 1959, the Respondent Local 248 and the Respondent International

Union called a strike of all the employes who were represented by Local 248 at the Complainant Employer's West Allis works.

7. That at all times during the strike, the Complainant Employer's shops at West Allis were open and work was available for any employe in the bargaining unit who wished to come to work and the individually named employes in the complaint, crossed the picket lines and performed work for the Complainant Employer at various times during the strike.

8. That at a membership meeting of the Respondent Local 248 on February 7, 1959, Edward J. Merten, President of Respondent Local 248, announced that any employe crossing the picket lines and working during the strike would be tried by the Union and fined after the strike ended, and further stated at that meeting:

> "After the strike, we will try them and fine them to a point where they'll wish they never crossed the picket line."

and that such statement was carried in the Milwaukee Journal, a newspaper of general circulation in the city of Milwaukee and West Allis, on February 7, 1959.

9. That some of the individually named Complainants who had crossed the picket line and worked during the strike, received letters from the executive Board of the Respondent Local 248 dated February 24, 1959, pointing ou that such action by the employe constituted a violation of the constitution and by-laws of the Respondent International Union and Respondent Local Union and subjected

each employee to a fine up to $100.00 for each offense; that said letters further stated:

> "Each day of violation may well constitute a separate offense."

10. That each of the individually named Complainants received by certified mail, a letter from Respondent Local 248 under date of May 5, 1959 informing each of said Complainants that they had been charged with violating Local 248 picket lines; that a trial committee would be selected to try them in accordance with the constitution of the International Union; and that they had been placed under suspension by the membership pursuant to the constitution of the International Union.

11. That the Respondent Local 248, pursuant to the constitution of the Respondent International Union, its By-Laws, Rules and Regulations, on June 13 and July 11, 1959, chose two Trial committees respectively, which Trial committees tried and determined the guilt or innocence of the individual Complainants, and other employes of the Complainant Employer similarly situated, upon charges of conduct unbecoming union members; that on September 12, 1959, said Trial committees issued their findings, decisions and judgment, and found each of the individual Complainants and those similarly situated, guilty of such charges; that each of the individual Complainants, with the exception of those subsequently noted, were each fined $100.00; that individual Complainant Frederick Uebele was fined $95.00; that individual Complainants Bernice Gerow and Michael Voit were fined $90.00; that individual Complainant Harry Gadouas was fined $80.00; and that the other

employes similarly situated were fined in amount varying from $15.00 to $100.00.

12. That pursuant to the constitution of the Respondent International Union, its By-Laws, Rules and Regulations, the reports of the two Trial committees were duly adopted by the membership of Respondent Local 248 on September 12, 1959; and that on or about September 18, 1959, the Recording Secretary of the Respondent Local 248 addressed a communication to each of the individual Complainants and other employes similarly situated as follows:

> "You have had a fair trial by the Trial committee, as selected by the members of Local 248, under the provisions of the International Constitution.
>
> The guilt and fine assessed against you for conduct unbecoming a union member has been brought to the membership for their consideration. The membership has upheld the Trial committee to their decisions and fines.
>
> You are, therefore, indebted to Local 248 in the sum of $..... and payment thereof is demanded in order to again be in good standing in Local 248.
>
> You may pay your fine by check or money order made payable to Local 248, UAW, or you may come to settle this matter in person.
>
> Respectfully,
>
> FRANK STARICH
> Recording Secretary"

13. That the Complainant, Allis-Chalmers Manufacturing Company, is engaged in, and the Respondent Union represents employes engaged in, a business affecting inter-

state commerce within the meaning of the Labor Management Relations Act, 1947.

Upon the basis of the above foregoing Amended Findings of Fact, the Board makes the following

AMENDED CONCLUSIONS OF LAW

1. That the activities of the Respondent Unions herein are of such nature that they are neither prohibited by, nor protected by the Labor Management Relations Act, 1947, as amended.

2. That the Respondent Local 248 of the United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, by threatening to impose fines or to otherwise discipline employes of the Complainant Employer who crossed the picket lines established by the Respondent Local 248 during the strike conducted by such union against the Complainant Employer and who performed work for the Complainant Employer during the strike, and by imposing fines upon said employes, has committed an unfair labor practice, in that by threatening to impose such penalties and by advising the employes that they were to appear for trial, and imposing fines upon such employes after hearing and trial, the Respondent Local 248 attempted to coerce and intimidate, and did coerce and intimidate each of the individual Complainants and other employes similarly situated in the enjoyment of their legal rights including the right guaranteed in Section 111.04 to refrain from engaging in concerted activities for the purposes of collective bargaining.

Upon the basis of the above foregoing Amended Findings of Fact and Amended Conclusions of Law, the Board makes the following

AMENDED ORDER

1. That the Respondent Local 248, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, immediately cease and desist (a) threatening any employee of the Allis-Chalmers Manufacturing Company with punishment by the imposition of a fine, or (b) attempting to impose or imposing or enforeing any punishment upon any employee of the Allis-Chalmers Manufacturing Company, because such employee crossed the picket lines of the Respondent Union and performed work for the Complainant Employer during the strike.

2. Within five (5) days of receipt of a copy of this Order, notify the Wisconsin Employment Relations Board what steps such Union has taken in compliance therewith.

SEAL

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of October, 1959.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By L. E. GOODING /s
L. E. Gooding, Commissioner

J. E. FITZGIBBON /s
J. E. Fitzgibbon, Commissioner

Chairman Morris Slavney Dissents with Memorandum as contained in the original Order issued by the Board in this matter.

FINDINGS AND ORDER OF WISCONSIN EMPLOYMENT RELATIONS BOARD

Case I No. 6989 Cw-257 Decision No. 5008-B

ROBERT BORCHARDT,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Case I No. 6990 Cw-258 Decision No. 5008-B

RUDOLPH BUSS,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Case I No. 6991 Cw-259 Decision No. 5008-B

CHARLES ENGEL,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Case I No. 6992 Cw-260 Decision No. 5008-B

LAWRENCE FIGGE,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Case I No. 6993 Cw-261 Decision No. 5008-B

CLIFFORD PESKE,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Case I No. 6994 Cw-262 Decision No. 5008-B

WILLIAM STAPEL,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Case I No. 6995 Cw-263 Decision No. 5008-B

KENNETH ZAJDEL,

Complainant,

vs.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,

Respondent.

Appearances:

Mr. John H. Wessell, Attorney at Law,

Mr. Harold W. Story, Attorney at Law, appearing for Complainants.

Mr. Robert E. Gratz, Attorney at Law, for Respondent

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaints of unfair labor practices having been filed individually by the above named Complainants, and said complaints having come on for hearing before the Wisconsin Employment Relations Board on August 28, 1958, at the Milwaukee County Court House, Milwaukee, Wisconsin; the entire Board being present; and the matters having been consolidated for the purpose of hearing; and the Board having considered the evidence, arguments and briefs of Counsel; and being fully advised in the premises, makes and files the following Amended Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. That the identity of the individual complainants are as follows:

a. Joseph Carey, an individual residing at 7944 North Green Bay Avenue, Milwaukee, Wisconsin,

b. Kurt Eigner, an individual residing at 4354-A North 18th Street, Milwaukee, Wisconsin,

c. Richard Nickel, an individual residing at 6404 West Eden Place, Milwaukee, Wisconsin.

d. George Remiszeweki, an individual residing at 6328 West Fairmont, Milwaukee, Wisconsin,

e. Gilbert Steinhagen, an individual residing at Route 2, Box 214, Thiensville, Wisconsin,

f. Robert Borchardt, an individual residing at 7707 South Clement, South Milwaukee, Wisconsin.

g. Rudolph Buss, an individual residing at 3159 South 22nd St., Milwaukee, Wisconsin,

h. Charles Engel, an individual residing at 2233 South 8th St., Milwaukee, Wisconsin,

i. Lawrence Figge, an individual residing at 8277 North 107th St., Milwaukee, Wisconsin,

j. Clifford Peske, an individual residing at 2259 West Bolivar Street, Milwaukee, Wisconsin,

k. William Stapel, an individual residing at 2520 North 41st Street, Milwaukee, Wisconsin,

l. Kenneth Zajdel, an individual residing at 2753 South 57th Street, Milwaukee, Wisconsin.

2. That Lodge 78 of the International Association of Machinists, AFL-CIO, hereinafter referred to as the Respondent Union, is an unincorporated labor organization with offices located at 5106 West Bluemound Road, Milwaukee, Wisconsin.

3. That the Allen-Bradley Company, a corporation, hereinafter referred to as the Employer, is engaged in manufacturing, with its plant and offices at 136 West Greenfield, Milwaukee, Wisconsin.

4. That at all times material herein all of the Complainants have been and are employed in the tool room of the Employer; that at all times material herein the Respondent Union has been and is the duly certified bargaining representative of the Employer's tool room employes; that on or about September 1, 1956, the Respondent Union caused a strike to be called among the tool room employes of the Employer; that at the time of said strike all the Complainants herein were members of the Respondent Union;

legal rights, including the right guaranteed in Section 111.04, to refrain from engaging in concerted activities for the purpose of collective bargaining.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Board makes the following

ORDER

That the Respondent, Lodge 78 of the International Association of Machinists, AFL-CIO, immediately cease and desist attempting to collect the fine heretofore imposed on each of the Complainants and to take steps setting aside such fine.

SEAL

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of April, 1959.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By L. E. GOODING /s/
L. E. Gooding, Chairman

J. E. FITZGIBBON /s/
J. E. Fitzgibbon, Commissioner

that prior to the termination of said strike, all of the Complainants chose to return to their employment and in doing so crossed the picket line established by the Respondent Union; that subsequently after the strike had terminated, in accordance with its constitution and by-laws, the Respondent Union levied individual fines of one hundred ($100) dollars against each of the Complainants because of their activity in crossing the picket line; that all the Complainants refused to pay such fine; and that on or about January 24, 1957, the Respondent Union commenced civil actions against the individual complainants in the Civil Court for Milwaukee County to collect said fines; and that said court actions are presently pending.

5. That the Respondent Union has taken no action nor made any demands upon the Employer with regard to the tenure or conditions of employment of any or all of the Complainants.

6 That the activities of the Respondent Union herein are of such nature that they are not regulated by the Labor Management Relations Act as amended.

Upon the basis of the above and foregoing Findings of Fact, the Board makes the following

CONCLUSIONS OF LAW

That the Respondent, Lodge 78 of the International Association of Machinists, AFL-CIO, by imposing fines of $100.00 on each of the Complainants has committed unfair labor practices in that by the imposition of such fine the Respondent Union attempted to coerce and intimidate each of the individual Complainants in the enjoyment of their

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

Joseph Carey et al.
Case I
Nos. 6938-6995 Cw-251-263
Decision No. 5008-B

MEMORANDUM ACCOMPANYING AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Twelve employes of the Allen-Bradley Company instituted twelve separate proceedings before the Board charging Lodge 78, of the International Association of Machinists, AFL-CIO with coercing and intimidating each of such individuals from the enjoyment of their legal rights. The complainants alleged that each of the employes was fined by the Union $100.00 for the reason that during the duration of the strike and while the Respondent was maintaining a picket line at the Employer's plant the Complainants elected to refrain from concerted activity, passing through the picket line and returning to work. Hearing on said complaint was held on August 28, 1958 at which time the proceedings were consolidated for the purpose of hearing. Thereafter, and on November 21, 1958, the Board made and filed Findings of Fact, Conclusions of Law, and an Order dismissing the complaints for the reason that this Board had no jurisdiction in the matter. Thereafter the complainants petitioned for a rehearing and the Board entered an Order granting a petition for rehearing and the said matter was heard on the 4th day of February, 1959. The parties

were given full opportunity to argue the matter and to file such briefs as they desired.

The facts were not in dispute. Each of the Complainants had been an employe of the Allen-Bradley Company and each had been a member of the Respondent Union which was the duly certified bargaining representative for the Employer's tool room employes. The Respondent Union caused a strike to be called among such tool room employes on or about September 1, 1956. Prior to the termination of the strike, each of the Complainants returned to his employment. After the strike was terminated, the Respondent levied fines of $100.00 on each of the Complainants because of their return to work during the progress of the strike and in so doing crossing the picket line established by the Respondent. The Complainants refused to pay such fines on or about January 24, 1957. The Respondent commenced actions in the Civil Court of Milwaukee County against each of the Complainants for the purpose of collecting such fine. Such action is still pending. The Respondent Union made no demands upon the Employer with regard to the tenure of employment of any of the Complainants.

In the determination of this proceeding, the statutes of the Federal L. M. R. A. and the Wisconsin Employment Peace Act must both be considered. The following statutes are involved:

L. M. R. A.

"Rights of Employees"

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." *Labor Management Relations Act.*

Section 8 (b)

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in Section (7)'; *provided that, this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*'"

WISCONSIN STATUTES

"*Section 111.04 Rights of Employees.* Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities." *Wisconsin Employment Relations Act.*

"*Section 111.06 (2)* It shall be an unfair labor practice for an employee individually or in concert with others:

(a) to coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04 . . ."

The states have no power to regulate any activity which affects interstate commerce and is regulated by L. M. R. A. (*Garner v. Teamsters Union*, 346 U. S. 485) In announcing that decision the court, among other things, stated that the Act "leaves much to the states." We must determine whether this proceeding involves one of activities thus left to the states.

States have power to regulate activities neither prohibited by nor protected by L. M. R. A. (*International Union UAWA v. WERB*, 336 U. S. 245)

The first question for the Board is, "Has Congress made such union conduct, as is involved in this case, subject to regulation by the Federal Board?"

Section 7 of L. M. R. A. and Section 111.04 of the Wisconsin statutes guarantees to employes the right of self organization, to form, join or assist labor organizations, and to engage in other concerted activities. At the same time, the right to refrain from any or all such activities is guaranteed to employes. Section 8 (b) (1) (A) of L. M. R. A. provides that it shall be an unfair labor practice for a labor organization to restrain or coerce employes in the exercise of their rights guaranteed in Section 7. This section also contains a proviso that the paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein. The National Board has passed upon the proviso contained in Section 8 (b) (1) (A) ruling that a fine imposed upon a Union member falls within such provision, and that the Board is powerless to act. (*Minneapolis Star and Tribune Case*, 109 NLRB 727) Subsequently, the U. S. Supreme Court expressly ruled that the proviso re-

moves the matter from federal law and permits state regulation. (*Machinists v. Gonzales*, 356 U. S. 617, 34 LC 71,547) The court said:

> "But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to Sec. 8 (b) (1) of the Act states that
>
> > "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition of retention of membership therein . . ."
> >
> > 61 Stat. 141, 29 U. S. C. Sec. 158 (5) (1).
>
> "The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See United Constr. Workers v. Laburnum Constr. Corp., 347 U. S. 656 (26 Labor Cases par. 68,460)."

From this it follows that the ultimate question involved in this controversy is neither a protected nor a prohibited activity by the terms of L. M. R. A. Thus the traditional

power of the state to enforce the rights of union members to refrain from concerted activities remains in tact.

The ultimate question for the Board now to determine is, "Does the WEPA prevent the imposition of a fine by a Union on its members for passing through a picket line and working during the progress of a strike?"

Section 111.04 guarantees to employes the right if they desire to refrain from engaging in concerted activities. This does not depend upon whether the employe is or is not a member of a labor organization. In either case, his right to refrain from such concerted activity is protected by the Act. The fine imposed on the individual complainants was imposed solely for the reason that each of them crossed the picket line and returned to work prior to the termination of the strike. In so doing, the employes were merely exercising their right guaranteed them to refrain from engaging in the concerted activities then being carried on by the Union. Fining employes for exercising the right to return to work necessarily is coercive. The mere threat of a fine would tend to intimidate employes and keep them in many cases from exercising their guaranteed rights. The threat of financial loss is the threat of property loss and may be just as coercive and intimidatory as physical violence exerted against individual employes. (*Retail Clerks' Union v. WERB*, 242 Wis. 21) The fines in this case were intended to coerce these employes and each of them to withgo rights guaranteed them by the statute. We have considered Building Trades Council v. Garmon decided Apr. 20, 1959, 43 LRRM 2838, and are satisfied that the rule set forth in our memorandum has not been changed by that decision.

We have therefore concluded that an order should be entered requiring the Respondent Union to cease and desist attempting to collect such fines.

Dated at the City of Madison, Wisconsin, this 27th day of April, 1959.

WISCONSIN EMPLOYMENT
RELATIONS BOARD

By L. E. GOODING s
L. E. Gooding, Chairman

J. E. FITZGIBBON s
J. E. Fitzgibbon, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS BOARD

Joseph Carey et al.
Case I
Nos. 6938-6995 Cw-251-263
Decision No. 5008-B

MEMORANDUM OF DISSENT

The Complainants contend that the proviso to Section 8 (b) (1) (A) of the Labor Management Relations Act removed the pre-emption of that Act in the instant matters and, therefore, the Wisconsin Employment Relations Board has jurisdiction thereof. An examination of the decisions of the National Labor Relations Board concerning the proviso, and where no other activity which might have been connected with the activity of the Union in regulating its

internal affairs was found to have occurred, does not in our opinion establish the fact that the proviso removes the pre-emption of the Federal Act. The first decision on the matter was made by the National Board in the *International Typographical Union Case* (86 NLRB 951). In that case the Complainant, among other things, alleged that the Union had violated 8 (b) (1) (A) of the Federal Act by coercing certain of its members to cooperate in an unlawful bargaining policy by threatening to expel recalcitrants from membership under provisions of the Union rule granting the Union expulsion power. The General Counsel argued that, because expulsion would deprive the expelled members of certain economic benefits of the Union membership relation, findings of coercion in the statutory sense could appropriately be premised on the threat. The Board agreed with the trial examiner and found that the argument was squarely at odds with the unambiguous language of the proviso and, therefore, was rejected. The Board said, "In our view, by including the proviso Congress unmistakenly intended to, and did, remove the application of the Union's membership rules to its members from the proscriptions of Section 8 (b) (1) (A) irrespective . . . of the direct effect thereof on particular employes." In a footnote, the Board stated after repeating the language of the proviso that, "It is unnecessary to do more than mentioned, that the guarantee of a right to "prescribe" rules extended to the enforcement of such rules as well.

The Board's decision was affirmed by the 7th Circuit of the U. S. Court of Appeals (20 Labor Cases 66,691). The court said:

"The ANPA points out that expulsion from ITU membership may involve the loss of the employee of his job and other economic benefits such as pension and mortuary provisions and that the threat of such deprivation certainly constitutes restraint and coercion upon an employee's right to refuse to join or take part in union activities. The Board insists, however, that the proviso to this section prevents the threat from being in violation of this section. . . . This proviso is attached to Section 8 (b) (1) (A) as a limitation on this particular definition of an unfair labor practice. It was within the legislative power of Congress to make or not to make the restraint or coercion of employees an unfair labor practice. If Congress chose to make such action illegal it could attach such limitations as it chose to the definition. . . .

. . . the coercion of employees by a labor organization is illegal only to the extent that it is declared so by Congress. In this section of the Act Congress has said that only such action was illegal which would 'not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.' Under this limitation Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. . . ."

The court further stated:

". . . the proviso in Section 8 (b) (1) (A) permits unions to enforce their internal policies upon their membership as they see fit."

In the *International Brotherhood of Teamsters, Local 294*, case (87 NLRB 972), the Board held that warnings to employes that they might lose their memberships in the union because of their strike breaking activities, and a re-

minder of the consequences entailed in loss of union membership, was privileged under the proviso, and since the expulsion was not violative of the Act, inasmuch as the union was privileged under the proviso to expell members for that reason, and it was therefore privileged to threaten to do so. In the footnote, the Board said "In this case persons were members of the Respondent (union), engaged in conduct which they were reprehensible to their union. In the circumstances, the remarks to them were reasonably calculated to convey only a threat or warning that the union might expell them from its membership, as it was privileged to do."

The language in the Circuit Court of Appeals affirming the *Teamsters Case* makes it clear that the activity of the Union in fining its members, as was done in this case, is an activity which is protected under the Federal Act.

In *Minneapolis Star and Tribune Co.* (109 NLRB 727) decided on August 26, 1954, the Board found that an imposition of the $500.00 fine on a member by the Union for said member's failure to engage in certain of its picketing activities was not violative of the Act. The Board stated, "It is well established that the proviso to Section 8 (b) (1) (A) precludes any such interference with the internal affairs of a labor organization."

The Complainants cited *Gonzales v. Machinists* (356 U. S. 617), as authority that the United States Supreme Court has determined that the subject matter of the proviso to Section 8 (b) (1) (A) is outside the coverage of the Federal Act. The Complainants argued that the Supreme Court passed on the question whether the proviso protected the Union against an action by a union member

prosecuted under a state law, and they argued that the Court answered this question as follows; "But the protection of Union members and their rights as members in arbitrary conduct by unions and union officers has not been undertaken by the federal law, and indeed the assertion of any such power has been expressly denied."

An examination of the *Gonzales* decision discloses that the original action in the State Court was for the enforcement of private rights and seeking of damages for wrong done to the individual union member. The Union in the *Gonzales Case* contended that because of the proviso the National Labor Relations Act pre-empted the field and therefore, the state of California had no jurisdiction to determine the matter. The Supreme Court pointed out that the crux of the claim sustained by the lower court was that under the California law, membership in a labor organization constituted a contract between the member and the Union; and that the state law provided a remedy for breach of such contract through wrong expulsion.

The Court stated:

> "The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership In either case, the potential conflict is too contingent too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract gover ng the relations between respondent and his unions."

In a footnote to this statement the Court stated:

"In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members. . . . It took the form of a petition or writ of mandate because damages alone would not be adequated to restore to petitioner the things of value he had lost by by reason of the breach. No charge of 'unfair labor practice' appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as a result of an unfair labor practice but as a result of breach of contract. Thus the question of unfair labor practice was not raised nor was any finding made on the subject. . . ."

The instant matters can be distinguished from the *Gonzales Case*. Herein the Complainants filed complaints alleging that the Union has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act by fining the members involved $100.00 and for choosing not to refrain from concerted activity and refusing to refrain from working during the period of a strike, and further that the Union has committed an unfair labor practice by bringing civil action to collect such fines. Actions brought before the Wisconsin Employment Relations Board are entertained by this Board not for the enforcement of private rights but in the exercise of the public pol-

icy of this state. Orders which are issued by this Board are not issued to vindicate personal rights of persons involved, but are issued rather in the interest of the public policy of this state.

I am of the opinion that the Federal Act governs and that this Board is precluded from exercising its jurisdiction of the subject matter of the litigation herein, since I believe that the proviso to Section 8 (b) (1) (A) protects the activity of the union herein in imposing the fine and attempting to collect same in the civil court, therefore, that this Board has no jurisdiction in the matter.

Assuming, arguendo, that it was not clear as to whether or not subject matter of this litigation was governed by the Federal Act, then in light of the most recent decision of the United States Supreme Court in the *Garmon Case*, this Board, under such circumstances, would have no jurisdiction to determine the matter. In that case, the Court spoke as follows: "At times it has not been clear whether particular activity regulated by the States was governed by Section 7 or Section 8 or was, perhaps, outside both of these sections, but courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction, too, must yield to the exclusive primary competence of the Board."

A search of the decisions of the National Labor Relations Board has failed to disclose any case where the Board has made any specific determination as to whether or not activity similar to that practiced in the instant matter is

either protected or prohibited. The U. S. Supreme Court, in Garmon, stated further as follows: "It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to Federal regulation involves danger of conflict with national labor policy."

It should be noted that in Garmon the Court made the following reference to the *Gonzales Case*: "However, due regard for the presuppositions of our embracing Federal system, including the principle of diffusion of power, not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was merely peripheral concern of the Labor Management Relations Act." Certainly the activities alleged herein to constitute an unfair labor practice under our State law is not a peripheral concern of the Federal Act. I am convinced that the Board's exercise of jurisdiction in this matter and the issuance of the order herein conflicts with the public interest expressed in the Federal Act.

Even if I were to be persuaded that this Board has jurisdiction in the matter, I would conclude that the levying and attempts to collect the fine of a nature would not amount to an unfair labor practice under our Act. There was nothing to compel the complainants involved in these

proceedings to become members of the respondent labor organization, nor was there any requirement that they remain members. Their membership and their retention of same, at least up to the time that the union took action with regard to them, was voluntary on their part. Their membership in the respondent union was governed by its constitution and by-laws, which instruments the complainant became bound upon becoming members. In fact, their membership constituted a contract between them and their union.[1] To say now that they cannot be reasonably expected to abide with the terms of their contract because they so chose to violate their contract by crossing the picket line in violation of the by-laws and constitution of said union is to permit them to benefit from their own violation. There has been no allegation that the events leading up to the imposition of the fines or the attempts to collect same have been unjust or unreasonable. The amount of the fine imposed is a reasonable amount under the circumstances. On a 40-hour week basis, it amounts to less than five cents per hour for a year's employment. It can be reasonably assumed that the union is responsible, through collective bargaining, for obtaining, in the very least, at least benefits equal to the fine for these employes. If employes who voluntarily become members of a labor organization reap the fruits resulting from such association, they must be deemed to live up to the reasonable conditions imposed for the harvesting of such fruits.

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[1]Local 261 UAW-CIO v. Cecilia Schulze, 3 Wis. 2nd 479; CIO-AFL-Local 756 v. Woychik, 93 NW (2nd) 336.

Dated at Madison, Wisconsin, this 27th day of April, 1959.

WISCONSIN EMPLOYMENT
RELATIONS BOARD

By MORRIS SLAVNEY /s/
Morris Slavney, Commissioner

MAR 14 1961
JAMES R BROWNING

Supreme Court of the United States

No. 760

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 760

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner,

vs.

LOCAL 248, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

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BRIEF OF RESPONDENT IN OPPOSITION.

OPINIONS BELOW; JURISDICTION.

The material in the Wisconsin Employment Relations Board Petition under the headings "Opinions Below" and "Jurisdiction" being adequately set forth, Respondent adopts the same for purposes of Brief for Respondents.

QUESTION PRESENTED.

Whether the jurisdiction of the Wisconsin Employment Relations Board was preempted by the Labor Management Relations Act of 1947, as amended, (61 Stat. 136, 29 U.S.C. 151, *et sez.*) when the State Board enjoined the

Respondent Union from imposing fines levied against its own members who violated a union rule against crossing its picket line during the course of a strike.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended, and the Wisconsin Employment Peace Act are adequately set forth in the Petitions.

STATEMENT.

The litigation involves the Allis-Chalmers Manufacturing Company of West Allis, Wisconsin, who had filed an unfair labor practice charge against the Respondent Union before the Wisconsin Employment Relations Board alleging that the Union was attempting to coerce and intimidate its own members, employees of the Company. (R. 151-154)

The Company is engaged in interstate commerce, and the Union is duly certified by the National Labor Relations Board as the exclusive bargaining agent for the production and maintenance employees of the Company. (R. 159)

In compliance with its Constitution the Respondent Union, on February 2, 1959, called a strike against the Company when all efforts for a new labor contract failed. (R. 157)

Concomitant with the strike peaceful picket lines were established outside the Company gates advertising the event and the nature of the strike to those about to enter the plant. During the course of the strike a number of Union members crossed the picket lines to enter the plant to work, contrary to the Union's decision. (R. 170)

Letters from the Union were thereupon addressed to these members warning them that their conduct might

subject them to trial and penalty by the Union. (R. 158)

Following the settlement of the strike and after a new contract was entered into between the Company and the Union, individual members of the Union filed charges against those members who had crossed the picket lines to enter the plant for the purpose of offering their labor to the Company while the strike was in progress. (R. 165, 167)

Trials were conducted in accordance with the Union's Constitution, and each of the members who had been charged with conduct unbecoming Union members appeared in person or with counsel, or both, before the Trial Committee. (R. 168-175)

Before the completion of the trials the Company filed a Complaint against the Union with the Wisconsin Employment Relations Board alleging that the threat of imposition of fines against the members, employees of the Company, was in the nature of coercion and intimidation and in violation of the Wisconsin Employment Peace Act, Chapter 111 of the Wisconsin Statutes. (R. 151-156)

The trials having been completed, the Trial Committees found that each of the offending members engaged in individual bargaining by accepting the terms of the Company when the same were rejected by the Union, their duly authorized collective bargaining agent; that each failed in their duty and obligation of membership; that they failed to acquit themselves as loyal and devoted members of the Union; and finally, that each offending member, though it was his duty to support the strike by the Union, gave aid and comfort to the Company against which the whole of the membership was then on strike (R. 168-178)

The offending members were found guilty of conduct unbecoming Union members and were fined in various

amounts ranging from Ten ($10.00) Dollars to One Hundred ($100.00) Dollars, depending upon the circumstances of the individual violation. (R. 177-178)

Upon stipulation of these facts the Wisconsin Employment Relation Board, in opposition to the Respondent Union's contention that the subject matter was not one over which it had jurisdiction since it falls within the area of regulation of the National Labor Relations Act of 1947, as amended, nevertheless entered its findings, conclusion and order enjoining the Union from, "(a) Threatening any employee of the Allis-Chalmers Manufacturing Company with punishment by the imposition of a fine, or attempting to impose or imposing or enforcing any punishment upon any employee of the Allis-Chalmers Manufacturing Company because such employee crossed the picket lines of the Respondent and performed work for the Complainant Employer during the strike." (App. p. 55)

The Circuit Court of Milwaukee County enforced the order of the State Board. (App. p. 21-29)

The Supreme Court of Wisconsin reversed (App. p. 1-16), saying:

> ". . . it is apparent that the arguments, in favor of holding that the activity of a Union which fines a member for crossing a picket line in violation of the Union's constitution and by-laws is protected by the Labor Management Relations Act are too potent to permit us to determine that such activity is not 'arguably within the compass of Sec. 7 or 8 of the Act.' This being the case, no state agency or court, but only the National Labor Relations Board has jurisdiction to determine whether such activity is protected by the proviso of Section 8(b)(1)(A) of the Act. *San Diego Unions* v. *Garmon*," 359 U.S. 236, 79 Sup. Ct. 773, 3 L. Ed. (2d) 775.

ARGUMENT.

A. The decision below is clearly correct.

What is pointed up in this case is the coincidence between the Federal Law, Sec. 7 and Sec. 8(b)(1)(A) of the Labor Management Relations Act, and Sec. 111.04 and Sec. 111.06(2)(a) of the Wisconsin Statutes. (App. p. 6-7) However, the National Labor Relations Act contains a proviso to Sec. 8(b)(1)(A) which will be discussed later.

It is crystal clear that both the State and Federal governments have enacted legislation prohibiting coercion or intimidation of employees or interference with their rights granted them under the respective Acts. A close examination of the Sections of these Acts will demonstrate their identity to one another.

It has been long settled by this Court that where coercion, peaceful in character, is involved, it is the Federal Act which has exclusive jurisdiction and which must be followed for remedies rather than the State Act. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953; *San Diego* v. *Garmon*, 359 U.S. 236.

The Wisconsin Employment Relations Board concluded that the conduct of the Respondent Union in imposing a fine against its own members for going through a picket line to work in a struck plant was coercive. That being so, it is the National Labor Relations Board which must be asked to exercise its jurisdiction. *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468; *Garner* v. *Teamsters Union*, 346 U.S. 485.

In the instant case, there are no overt acts involved as would excite State jurisdiction. The case does not

involve mass picketing,[1] recurrent work stoppages,[2] or a claim for damages based upon violent conduct;[3] nor is it a proceeding where a member sues its Union at law for breach of its Constitution;[4] for it is only under these circumstances that this Court has upheld State action.

After citing *in extenso* the relevant sections of both the Federal and State Acts, the Supreme Court of Wisconsin said:

> "An examination of the above quoted statutory provision disclosed that sec. 111.04, Wis. Stats., provides substantially the same as does Section 7 of the Labor Management Relations Act. Likewise sec. 111.06(2)(a), Wis. Stats., corresponds closely to the aforequoted portion of Section 8(b)(1) of the Labor Management Relations Act except for the proviso provision of the latter, which reads as follows:
>
> > 'Provided, That this paragraph shall not *impair the right* of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;' (Italics supplied.)"

The Petitioner would characterize the proviso as a corridor of escape for State regulation. But both the legislative history of the proviso[5] and court and Board decisions disclose that its intent and purpose is to give strength to the "requirements and standards of membership in the union itself," thus classifying internal union affairs as protected activity.

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[1] **UAW v. WERB**, 351 U.S. 266.
[2] **Int. Union v. WERB**, 336 U.S. 245.
[3] **United Construction Workers v. Laburnum**, 347 U.S. 656.
[4] **Gonzales v. IAM**, 356 U.S. 617.
[5] **II Legis. Hist. 1141, 93 Cong. Rec. 4272.**

As was said by the Supreme Court of Wisconsin (App. p. 7):

> "The parties concede that a fine imposed by a union pursuant to its constitution and by-laws upon a member, who has violated such constitution and by-laws by crossing a picket line during a strike in order to continue his employment, is a union activity embraced within the scope of such proviso. If it were not, then there clearly would be preemption because, if the union conduct at issue here constitutes illegal coercion, it would be prohibited under the federal Act as well as the Wisconsin Employment Peace Act. Therefore, the crucial question is whether Congress by insertion of such proviso intended to make such an activity a protected one, or whether it intended that such union conduct should remain outside of the scope of Congressional regulation so that the states might regulate it if they so desire. It is the latter interpretation that was adopted by the majority members of W.E.R.B. and the trial court."

We need not reach to the position that the activity involved is protected absolute. It is enough if it is "arguably within the compass of Sec. 7 or sec. 8 of the (Labor Management Relations) Act." *San Diego Unions* v. *Garmon*, 359 U.S. 236.

"If it is," correctly stated the Supreme Court of Wisconsin, "then the state's jurisdiction is displaced and the issue must be decided by the National Labor Relations Board and not by the court of the states. This is because that is the agency which Congress has clothed with authority to determine such issue. The failure of such board to define the legal significance under the Act of a particular activity does not give the states power to act." (App. p. 8)

B. There is no conflict of decision.

The National Labor Relations Board has had opportunity to pass upon the issue whether the conduct involved in this proceeding falls within the orbit of the provision of Sec. 8(b)(1)(A). Its decisions have consistently held that it does. The U. S. Court of Appeals, Seventh Circuit in *American Newspaper Publishers Assn.* v. *NLRB,* 193 F. (2d) 782 held,

> "The proviso in Sect. 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

The later Seventh Circuit decision, *Allen Bradley* v. *NLRB,* Case No. 13042, February 9, 1961, is simply to the effect that where the employer requests the union to bargain upon the subject of union fines growing out of a strike situation, the Union must entertain such request:

> "In our view, and we so hold, the proposals made by the Company presented a proper subject for collective bargaining, concerning which the Union was obliged by the act to bargain in good faith . . ."

In the case of *Sanders* v. *Int. Ass'n of Bridge, Structural & Ornamental Iron Workers,* 235 Fed. (2d) 271, where the issue of the legality of a provision in a union constitution, permitting the expulsion for life of a member found guilty of violating certain of its provisions, the court predicated the right of the union to act upon Sec. 8(6)(1)(A) of the Labor Management Act.

The petitioner has cited no contrary decision which is in conflict with Wisconsin's preemption determination. On the contrary, since *Garmon,* other states have complied with this Court's approach. See: *Dooly* v. *Auton,* (1960), 3 N.Y. 2d 91, 168 N.E. (2d) 356.

C. There is no important question of Federal Law.

That the National Labor Relations Board is entrusted with the exclusive administration of the Labor-Management Relations Act has been well established (Garmon). Petitioner has failed to show any reason for abandoning this principle.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

Nos. 760, 761.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner,

v.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Respondent.

On Petitions for Writ of Certiorari to the Supreme Court of Wisconsin.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Wisconsin Supreme Court is printed in 11 Wis. 2d 292, 105 N. W. 2d 278. Since this case was argued as a companion case, the principal opinion of Wisconsin Supreme Court is reported in 11 Wis. 2d 277, 105 N. W. 2d 271.

Opinions of the circuit court of Milwaukee County covering this and companion case are reported at 46 L. R. R. M. 2628. The orders and accompanying memoranda opinions of the Wisconsin Employment Relations Board are unreported.

All of the above opinions have been reproduced in the separate appendix of the Petitioner W. E. R. B., and all references to state court opinions will be in reference to where the opinions appear in such appendix.

The original findings and order of the W. E. R. B. are not contained in the appendix of the W. E. R. B. and are unreported. These findings and order are printed in the record filed herein at pages 150-153, and are therefore not reproduced.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTION PRESENTED.

Does a state board or court have jurisdiction to prohibit activity of a union representing employees of an interstate employer in view of the fact that legality of such activity must be determined by application of the National Labor Relations Act, as amended?

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended, and the Wisconsin Employment Peace Act are adequately set forth in the Petitions.

STATEMENT.

Lodge 78, I. A. M. is the certified bargaining agent for employees employed in the tool room of the Allen-Bradley Company (R. 179). This company is one whose business affects interstate commerce within the meaning of the Labor Management Relations Act of 1947, as amended (R. 181).

On September 1, 1956 a strike was called among these employees (R. 179). During the course of this strike fourteen employees, also union members, crossed the picket line and went to work (R. 179). Subsequent to termination of the strike, these members were tried for conduct unbecoming members according to the constitution of the union and fined $100.00 (R. 180).

All of these employees were voluntary members of the union whose membership was terminated for failure to pay periodic dues (R. 181). At no time has the union attempted to interfere with the job rights of these employees (R. 181).

In December, 1956, each of these fourteen employees received demand from counsel for the union for payment of the fines (R. 180). On January 24, 1957, the union commenced fourteen separate actions in the Civil Court of Milwaukee County to collect these fines. These actions are still pending (R. 180).

All fourteen of these employees filed unfair labor practice charges with the National Labor Relations Board (R. 181). The General Counsel of the National Board refused to issue complaints on October 28, 1957 (Opinion F-198) (R. 180). Twelve of the fourteen employees then filed identical unfair labor practice complaints with the Wisconsin board, claiming the union, in fining its members, committed unfair labor practices under Wisconsin law (R. 142-144). The union claimed in its answer that its activity was either prohibited or protected under the fed-

eral Act, and that the state board therefore had no jurisdiction (R. 146, 147).

On November 21, 1958, after hearing by the state board, said board by unanimous decision dismissed the twelve complaints on the grounds that the federal Act preempted the union activity and that the state board had no jurisdiction (R. 150-153). After motion for rehearing, the state board amended its findings and order, and, by two to one decision, found the union guilty of committing a state unfair labor practice (R. 154-158).

The union appealed from this order, predicating its appeal, *inter alia*, that the state board had no jurisdiction over the subject matter in that same was preempted and specifically protected by the federal Act (R. 178).

This appeal was determined by the Circuit Court of Milwaukee County, which found no preemption or conflict and sustained the jurisdiction and order of the state board (W. E. R. B. App. pp. 30-46). The union appealed this judgment, and the Wisconsin Supreme Court unanimously reversed the circuit court and state board and held there was preemption, and that the state board had no jurisdiction (W. E. R. B. App. pp. 1-20). At the time of argument before the Wisconsin Supreme Court, all parties agreed that the union committed no violation of the federal Act because otherwise there would clearly be preemption (W. E. R. B. App. p. 7).

Concomitant with the filing of complaints with the state board by twelve employees, the remaining two employees commenced an action in federal District Court in Washington, D. C. to compel the General Counsel of the National Board to issue complaints (R. 181). Both the District Court and Circuit Court of Appeals refused to compel the General Counsel to issue complaints under the federal Act.*

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* *Bandlow et al. v. Fenton* (1959), 38 Labor Cases, par. 65,779 (U. S. D. C. Dist. of Col.); *Bandlow et al. v. Rothman et al.* (1960), 278 F. (2d) 866 (C. A. Dist. of Col.).

ARGUMENT.

The issue in the case at bar is uniquely narrow and restricted. Neither scatter-gun technique nor strained semantics can convert it into one warranting review by this Court on certiorari. The state court defined the federal question as "whether Congress by insertion of such proviso [referring to 8 (b) (1) (A)] intended to make such an activity a protected one, or whether it intended that such union conduct should remain outside of the scope of Congressional regulation so that the states might regulate if they so desire" (W. E. R. B. App. p. 7).

At the state court level, Petitioners agreed that the union activity complained of was embraced within the scope of the proviso (W. E. R. B. App. p. 7). Had there been no such agreement, then there clearly would be preemption because the union conduct would be prohibited under the federal Act as well as under state law. **Garner v. Teamsters** (1953), 346 U. S. 485.

Despite this agreement, Petitioners now contend that the union activity here involved is prohibited by the federal Act, and that this Court should therefore grant certiorari. Since the state court did not rule on this issue, it is not properly before this Court for review on certiorari or otherwise.

It must be further noted that the individual Petitioners filed charges with the National Labor Relations Board (hereinafter referred to as "N. L. R. B.") before proceeding to the state labor board and state courts. On October 28, 1957 (Opinion F-198), the General Counsel of the N. L. R. B. dismissed the charges on the ground that the conduct of the union was excluded from the definition of unfair practices under federal law by the proviso to sec. 8 (b) (1) (A). It appears conclusively that after such determination by the General Counsel the individual Petitioners relied solely on state law for vindication of their

claims. Where the state court predicated its determination on agreement by Petitioners that the federal Act did not prohibit the union conduct, Petitioners cannot now seek to reverse the dismissal by the General Counsel of the N. L. R. B. by seeking a review of the state court decision.

The Petitioner, Wisconsin Employment Relations Board (hereinafter referred to as "W. E. R. B."), has also attempted to inject another issue not determined by the state court. On pages 8 and 9 of its Petition, Petitioner W. E. R. B. asserts that the decision of the state court conflicts with the Labor Management Reporting and Disclosure Act of 1959. The state court's decision was limited to rights protected under the National Labor Relations Act, as amended. Section 603 (b) of the Reporting and Disclosure Act of 1959, provides:

> ". . . nor shall any thing contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

Inasmuch as the state court's decision was predicated solely on rights protected under the National Labor Relations Act, other issues are not properly before this Court for review. The very Act relied upon by Petitioner demonstrates that this is manifestly correct.

I.

The Decision Below Is Clearly Correct.

1. The state court complied meticulously with the jurisdictional guide posts established by this Court in **San Diego Building Trades Council v. Garmon** (1959), 359 U. S. 236. In applying the test of preemption the state

court found that the union activity complained of was "arguably within the compass of sec. 7 or sec. 8" of the federal Act. This finding was predicated upon four cases: **Sanders v. International Ass'n. of Iron Workers** (1956), 235 Fed. (2d) 271 (C. A. 6); **Allen Bradley Company** (1960), 127 N. L. R. B. No. 8; **Minneapolis Star and Tribune Co.** (1954), 109 N. L. R. B. 727; and **Internat'l. Typographical Union** (1949), 86 N. L. R. B. 951.

These cases clearly demonstrate that the N. L. R. B. interprets the proviso as having the effect of making the enforcement by a union of its own constitution and by-laws a protected activity under the federal Act. The state court reviewed these cases (W. E. R. B. App., pp. 13[illegible] and further determined that such interpretation was "permissible", especially since Congress used the word "right" when referring to the union activity of prescribing rules for acquisition and retention of membership.

Petitioners now contend that this Court should interpret the proviso to give the states jurisdiction. Such request is clearly contrary to **Garmon.** Assuming that the decisions relied upon by the state court do not determine with "unclouded legal significance" that the activity here is protected, this still does not leave state labor boards or courts jurisdiction to determine the status of the activity. This Court in **Garmon,** 359 U. S. at 246, stated:

> ". . . It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows our decisions in

Weber and **Guss**. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

There are no National Board cases cited by Petitioners that purport to define the activity of the union as not protected under the proviso to 8 (b) (1) (A) of the federal Act. Alternatively, the disputed activity is "arguably" protected or there has been no determination by the N. L. R. B. which precisely defines the legal significance of such activity. The states can have no jurisdiction to determine in which area the disputed activity falls.

Petitioners cite numerous decisions of this Court and the eminent Professor Archibald Cox that state courts and this Court on review decided whether particular activities were within the purview of Sections 7 or 8 of the federal Act. This approach is "no longer of general application" since questions of interpretation of the federal Act are committed in the first instance to the administrative processes of the National Board. **Garmon**, 359 U. S. at 245, n. 4. Obviously the cases relied on by Petitioners (and the statement of Professor Cox) antedate the preemption approach adopted by this Court. Petitioners still assert that this Court should "compound the defects of a now discarded approach to preemption." **N. L. R. B. v. Insurance Agents** (1960), 361 U. S. 477.

2. The state court correctly applied **Machinists v. Gonzales** (1958), 356 U. S. 617, in conjunction with **Garmon** in deciding that the state labor board had no jurisdiction. The state board, in an unfair labor practice proceeding,[1]

[1] In the case at bar individual Petitioners filed unfair labor practice charges before the W. E. R. B. not for assessment of damages nor enforcement of private contractual rights created by the union constitution, but in reliance upon exercise of power by the state board in enforcing state labor policy. This Court acknowledged this basic distinction in *Gonzales*, 356 U. S. at 622, footnote.

attempted to "regulate the vital economic instruments of the strike and picket line and impinge on the clash of still unsettled claims between employers and labor unions." **Garmon**, 359 U.S. at 241.

In rendering its decision, the state court correctly found that the activity which the state board attempted to regulate was not "merely peripheral" but regulated the very heart and guts of activities regulated by Sections 7 and 8 of the federal Act (W. E. R. B. App. pp. 10-12). The right of the union to impose a fine upon a member for going through a picket line certainly affects in ultimate result the success of the conflict between the union and company in collective bargaining as well as it affects the exercise of rights to engage in concerted activities protected by Section 7 of the federal Act. The petitioning state board candidly admits that the state regulation here was specifically designed for the very purpose of affecting the balance of bargaining power (W. E. R. B. Petition, p. 10). Such attempt by the state "involves too great a danger of conflict with national labor policy." **Garmon**, 359 U. S. at 246.

Grave concern is expressed by Petitioner that because the subject matter in the case at bar is preempted, all jurisdiction is lost by the state in proceedings pertaining to a union's constitution and by-laws. The decision of the state court clearly states otherwise.

The state court's decision unequivocally recognizes that in those areas of "merely peripheral concern" to the federal labor Act, the states still have jurisdiction (W. E. R. B. App. pp. 9-10). This historical application of common law by the state, and acknowledged by this Court in **Gonzales**, will still be applied by the state in those "peripheral" areas where the contractual rights arising out of the union constitution "are too remotely related to the public interest sought to be protected by the Labor Management Rela-

tions Act to require a holding that there exists preemption under such Act" (W. E. R. B. App. p. 10). The Wisconsin court has been rarely reticent in utilizing the full measure of allowable state jurisdiction in the labor matters. Based on the state court's clear assertion in the case at bar, Petitioners' fears are patently groundless.

II.

There Is No Conflict of Decision.

Conflict of decision within a particular state is resolved by the state supreme court. In the case at bar the Wisconsin court has determined with clarity and certainty that the W. E. R. B. and Wisconsin courts may function in the "peripheral" areas; and the state court, in conformity with **Garmon** and **Gonzales**, has delimited state board and court jurisdiction where state control "involves too great a danger of conflict with national labor policy." **Garmon**, 359 U. S. at 246.

The Petitioners have cited no contrary decision in any other state in conflict with the Wisconsin court's preemption determination. On the contrary, since **Garmon** other states have complied with this Court's new approach. See **Dooly v. Anton** (1960), 8 N. Y. 2d 91, 168 N. E. (2d) 256. There is no need for this Court to resolve a conflict that does not exist.

III.

There Is No Important Question of Federal Law.

This Court in **Garmon**, 359 U. S. at 246, recognized that it was withdrawing a "narrow area" from possible state control where the National Board had not determined with "unclouded legal significance" that a particular activity is within or without federal regulation. Since the activity

here falls within this "narrow area", there is no impelling consideration shown by Petitioners that ultimate resolution of this activity should not be made by the exclusive primary agency entrusted with administration of the federal Act—the National Labor Relations Board.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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